MISSISSIPPI LAW JOURNAL

WORK OF THE MISSISSIPPI SUPREME COURT
1942-1946

WORK OF THE 1944 AND 1946 SESSIONS OF
THE MISSISSIPPI LEGISLATURE

December, 1946

VOLUME XVIII NUMBER 1

Mississippi Law Journal

JOURNAL OF THE MISSISSIPPI STATE BAR

VOL. XVIII DECEMBER, 1946 No. 1

Contents

THE WORK OF THE MISSISSIPPI SUPREME COURT, 1942-1946

I. CONTRACTS AND COMMERCIAL LAW ..... *Vardaman S. Dunn* 3

II. CRIMINAL LAW ..... *Fred B. Smith* 16

III. EVIDENCE ..... *John H. Fox, Jr.* 24

IV. INSURANCE ..... *O. B. Triplett, Jr.* 58

V. PLEADING, PRACTICE AND PROCEDURE ..... *John C. Stennis* 63

VI. PROPERTY ..... *L. G. Fant, Jr.* 80

VII. PUBLIC LAW ..... *Littleton Upshur* 91

VIII. TAXATION ..... *Francis S. Bowling* 105

IX. TORTS ..... *David C. Welch* 114

THE WORK OF THE 1944 AND 1946 SESSIONS OF THE MISSISSIPPI LEGISLATURE ..... *John W. Kyle* 132

NOTE

Taxation of Oil and Gas Interests in Mississippi 143

RECENT DECISIONS

Administrative Law—Notice and Hearing—Revocation of Beer Permit by State Tax Commissioner 169

Constitutional Law—Political Question—Apportionment 170

Husband and Wife—Liability of Wife for Necessaries 172

Labor Law—N.L.R.A.—Legality of "Company Plans" 175

Property—Acquisition of Public Road by County—Prescription or Dedication? 177

Witnesses—Privileged Communications—Clergyman and Penitent 180

Entered as second class matter at the Post Office at University, Mississippi, November 25, 1936.
Published in October, December, March, and May
$3.00 Per Annum 75 Cents per Current Number
EDITORIAL AND BUSINESS OFFICE, UNIVERSITY, MISSISSIPPI

Mississippi Law Journal

JOURNAL OF THE MISSISSIPPI STATE BAR

Volume XVIII December, 1946 Number 1

THE WORK OF THE MISSISSIPPI SUPREME COURT, 1942-1946*

I.

CONTRACTS AND COMMERCIAL LAW

Vardaman S. Dunn†

A. Private Contracts

(1) Validity and Avoidance

The court decided several cases of interest involving the validity of private contracts and the avoidance thereof by one of the contracting parties on various grounds.

(a) *Failure to Read*

It is well settled that a person may not avoid a written contract merely because he did not read it or have it read to him and supposed its terms to be different. Yet the contract may be avoided when it appears that such failure was induced by fraudulent misrepresentations of the other party on which the defrauded party was entitled to rely. These general rules were applied in two decisions of interest.[1]

(b) *Mental Capacity*

Mental incapacity to execute a valid deed is not shown by proof merely that the grantor suffered intermittent abnormality on particular occasions prior to its execution. So holding in *Lambert v. Powell*,[2] the court announced that mental capacity appears if the grantor understood and appreciated the nature of his act, the natural objects or persons of his bounty and their relations to him and was capable of reasoning and thinking of how he desired to dispose of his property. In as much as

*This review covers the period beginning with the September, 1942, term, and extending through the March, 1946, term. For previous reviews, see 11 Miss. L. J. 1 (1938), 12 Miss. L. J. 1 (1939), 13 Miss. L. J. 1 (1940), 14 Miss. L. J. 1 (1941), and 15 Miss. L. J. 1 (1942).

†Member Mississippi and Hinds County Bars; Jackson, Mississippi.

[1]McCubbins v. Morgan, 23 So. (2d) 926 (Miss. 1945); Koenig v. Calcote, 25 So. (2d) 763 (Miss. 1946).

[2]24 So. (2d) 773 (Miss. 1946).

the grantor is presumed to have capacity, the burden of proof is upon the complaining party to show incapacity within the rule at the time of execution of the deed. Further with reference to the burden, the court observed that the complaining party makes a prima facie case by showing habitual insanity, but that where the burden is not met in any respect, the mere failure of the defendant to offer as a witness the official who took the acknowledgment would not affect the result.

(c) *Mistake of Fact or Law*

In *Everett v. Hubbard*[3] the court re-announced the general rule that equity will not grant relief from a contract upon a mistake of law but will do so, in appropriate cases, for a mutual mistake of fact without which the contract would not have been made.

But in another case,[4] which, incidentally, involved elements of overreaching and circumstances of extreme hardship, the court seems to have abandoned a technical distinction between mistakes of fact and law, preferring to resolve each case along the lines of established equitable principles. The court, after re-announcing the general doctrine that a mistake of law, "pure and simple," is not ground for relief or cancellation, proceeded to approve the view that the mistake is not "pure and simple" if (1) accompanied by other special features creating independent equity, such as inequitable conduct of the other party, or (2) is as to private legal rights or interests, as distinguished from the general law. Also, it was held that relief may be granted when the mistake of law is (1) induced by the opposite party or (2) where there has been no substantial change of position by the other party and considerable hardship would be imposed upon the one mistaken.

Also, there may be an exception to the conventional rule in cases of family settlements. It was held in *Strong v. Cowsen*[5] that such contracts will be permitted to stand in many instances, notwithstanding they are based on mistake of law or fact, provided there is an absence of conduct otherwise inequitable. The justification for the exception is said to lie in the fact that family settlements are highly favored.

In *Jackson v. Day*[6] the court set aside a deed for mistake of a fact induced by representations of the purchaser that the land had been sold for taxes and that a relatively large sum would be required to redeem. The grantor in this case was an ignorant negro woman and elements of overreaching appeared.

---

[3]25 So. (2d) 768 (Miss. 1946).
[4]Baker v. Hardy, 194 Miss. 662, 11 So. (2d) 803 (1943).
[5]197 Miss. 282, 19 So. (2d) 813 (1944).
[6]193 Miss. 379, 9 So. (2d) 789 (1942).

(d) *Foreign Corporations*

The contract of a foreign corporation doing business in this state is void and unenforceable when made prior to its qualification under applicable statutes. In *Newell Contracting Co. v. State Highway Comm.*[7] the rule was applied to a contract for the construction of a public highway. Answering the several contentions of the corporation, the court held that the execution of such a contract amounted, within itself, to "doing business" in the state; that it was not merely an "isolated transaction" within the exception to the rule and that qualification subsequent to the execution but before completion of the contract did not relate back and render the contract valid.

(e) *Gaming*

By statute, gaming contracts are void. *Capps v. Postal Telegraph-Cable Co.*[8] dealt with a "futures contract," holding such to be utterly void and in the eyes of the law simply nonexistent, hence that a claim for damages against a telegraph company for failing to forward a message containing instructions to purchase such a contract could not be sustained.

(f) *Public Policy*

Applying the principle that contracts which tend to be injurious to the public or against the public good are illegal and void, the court in *Independent Linen Service Co. Inc. v. Sennett*[9] refused to allow recovery upon a contract between appellant and an auditor of the State Tax Commission whereby the auditor was to receive a certain percentage of recovery for taxes illegally collected. It is not necessary that actual injury to the state be shown from the particular contract.

(g) *Usury*

Good faith and mistake of fact, as distinguished from a mere mistake as to the legal effect of a purposeful act, is a good defense to a charge of usury. It was so announced in *Jones v. Hernando Bank,*[10] the court being careful to point out, however, that "this does not mean that one may be held guiltless merely because he did not deliberately violate the statute or because he was ignorant of or misinterpreted the statute."

There is no vested right in the usury law. Based upon this principle the court, in *Deposit Guaranty Bank and Trust Co. v. Williams,*[11] held

---

[7]195 Miss. 395, 15 So. (2d) 700 (1943).
[8]197 Miss. 118, 19 So. (2d) 491 (1944).
[9]194 Miss. 366, 12 So. (2d) 530 (1943).
[10]194 Miss. 474, 478, 13 So. (2d) 31, 32 (1943).
[11]193 Miss. 432, 9 So. (2d) 638 (1942).

that such laws may be repealed or changed so as to affect causes of action and defenses even in pending suits. Usury, it is said, was unknown to the common law.

(h) *Sunday Contracts*

The court decided two cases involving the defense that the contracts sought to be enforced were executed on Sunday.[12] In *Smith v. Mills,* the court held that where an official of a corporation had been lawfully elected and his salary fixed by the board of directors, he could not be discharged by action of the board thereafter in a meeting held on Sunday. In *Armstrong v. Shell* the court held that a defendant who objects to the enforcement of a contract made on Sunday is not precluded in his defense on the principle of *pari delicto.* In both of the cases mentioned the contracts were negotiated and executed on Sunday. In neither were there any elements of ratification upon a secular day.

(i) *Fiduciaries*

Of course, it is well settled that fiduciaries may not acquire an interest in the subject matter out of which the relation grows adverse to the principal to whom the duty of good faith is due. The relationship includes that of trustee and beneficiary, partners, principal and agent, guardian and ward, managing directors and corporations, but in *Risk v. Risher*[13] the court applied the rule to the relation of landlord and tenant under the special facts of the case, pointing out, however, that the mere relation alone does not create a fiduciary relationship. The facts are too involved for statement here, but the court quoted with approval from a federal case as follows: "Wherever one person is placed in such a relation to another by the act or consent of that other, or by the act of a third person, or of the law, that he becomes interested for him, or interested with him, in any subject of property or business, he is in such a fiduciary relation with him that he is prohibited from acquiring rights in that subject antagonistic to the person with whose interests he has become associated." It is this principle and not the name given to the particular relationship that is controlling in each case.

(j) *Statute of Frauds*

An oral chattel mortgage was upheld in *Burton v. Atkins*[14] as against the contention that the same was within the statute of frauds. The court

---

[12]Smith v. Mills, 24 So. (2d) 864 (Miss. 1946); Armstrong v. Shell, 26 So. (2d) 344 (Miss. 1946).

[13]197 Miss. 155, 163, 19 So. (2d) 484, 486 (1944).

[14]24 So. (2d) 355 (Miss. 1946).

stated that the question was a new one in this state and noted a conflict among the authorities elsewhere.

In *Partee v. Pepple*[15] the court held that a broker's contract creating an agency to sell need not be in writing in so far as the commission earned thereunder is concerned.

The court decided two cases involving oral agreements to make a will conveying real estate. In both cases the promises to convey were upon valuable consideration actually paid in services rendered, but in the first case[16] the will was never executed and the court held that the agreement was within the statute. In the second case[17] the will was executed but later revoked. In this case, it was held that the agreement to convey was executed by the making of the first will and hence was not within the statute. As against the devisee in this will, it was held that the will could not be revoked.

Incidentally, in the first above-mentioned case the court also held that where the promise is to convey real and personal property in return for a consideration, the agreement is not separable as to validity. In the second case, wherein the agreement to convey was upheld, the court nevertheless observed that such transactions must be carefully examined for traces of fraud. There were forceful dissents in both cases.

(2) Negotiable Instruments

Among the cases dealing with negotiable instruments will be found answers to such questions as: When is payment presumed from the fact of possession of an uncancelled note by the maker? When does the statute of limitations begin to run upon a series of notes containing an acceleration clause? May one member of a partnership negotiate a note? Does a bank guarantee the signature of the payee? Is a parol agreement valid to reduce interest as between the parties? Is good faith a defense to the failure of a warehouseman to take up receipts on delivery of the commodity?

(a) *Presumption of Payment*

Since the presumption of payment from possession of an uncancelled note by the maker arises out of the maker's obligation to pay, it was held in *McCaslin v. Willis*[18] that the presumption did not arise when possession was obtained prior to maturity or before the date on which payment is permissible according to the tenor of the note. Also, it was said,

[15]197 Miss. 486, 20 So. (2d) 73 (1944).
[16]Wells v. Brooks, 24 So. (2d) 533 (Miss. 1946).
[17]Johnson v. Tomme, 24 So. (2d) 730 (Miss. 1946).
[18]197 Miss. 366, 19 So. (2d) 751 (1944).

the presumption will be denied if the possession may be satisfactorily accounted for upon any reasonable theory other than payment. The presumption, as in the cited case, may become all important where witnesses are dead or disqualified.

(b) *Limitations*

Pointing out that an acceleration clause in a series of notes simply providing that the holder "may declare" the entire debt due on default is not self-executing but requires the holder to take "some step as will evince or declare his election to that effect," the court, in *Thomas v. Fidelity Mut. Life Ins. Co.*,[19] held that the statute of limitations did not begin to run upon that part of the indebtedness not so accelerated until the maker's default according to the tenor of the notes. Other decisions were distinguished.

(c) *Negotiation*

In *Baker v. Connecticut Gen. Life Ins. Co.*,[20] the court held that one partner alone may negotiate a note payable to the firm when the act is within the scope of the partnership business. The court denied that the determination of such questions depended upon a distinction between a commercial and other types of partnership.

(d) *Discharge and Modification*

Although it is held that an agreement, oral or written, to alter the terms of a note, such as one to reduce the interest rate, is unenforceable, unless supported by a valuable consideration, which must be something more than payment of an existing obligation,[21] it is also true that a subsequent oral agreement when properly supported by a valuable consideration, especially when acted upon by both parties, is valid even if it alters or abrogates the writing.[22]

(e) *Warehouse Receipts*

A statute[23] imposes an absolute duty upon a warehouseman who delivers goods for which he has issued a receipt to take up and cancel the receipt. Applying this statute, the court held that the duty thus imposed was non-delegable and absolute, so that as against the claim of a holder for value in good faith, it is no defense that the omission to com-

---

[19]196 Miss. 222, 15 So. (2d) 915 (1943).
[20]196 Miss. 701, 18 So. (2d) 438 (1944).
[21]Barcroft v. Armstrong, 21 So. (2d) 817 (Miss. 1945).
[22]Renfroe v. Aswell, 21 So. (2d) 812 (Miss. 1945).
[23]Miss. Code Ann. (1942) § 5022.

ply with the statute was the result of the negligent, willful or even criminal act of an agent.[24]

(f) *Forgery*

As pointed out in *Citizens Bank of Hatticsburg v. Miller,*[25] an endorser, whether for accommodation or for value, guarantees that previous endorsements upon a check are genuine. Applying this rule, it was held that a bank to which a check was negotiated by one other than the payee, was entitled to recover of the last endorser where, after cashing the check, it appeared that the endorsement of the payee had been forged. The court further held that a bank is not bound to know and does not guarantee the genuineness of the signature of a payee so as to preclude recovery as against the last endorser.

(3) Liens

A number of questions dealing with the existence, enforcement and priority of liens of various types were presented to the court. Those of special interest and involving attorney's liens, vendor's liens, mechanic's liens, equitable liens, and oral mortgages are here noted.

(a) *Attorneys*

An attorney taking a case upon a contingent fee basis has a lien upon any judgment obtained and an "equitable assignment" of the recovery to the extent of his agreed share thereof. In *Stribling Motor Company v. Smith,*[26] the lien was held to prevail in a suit by the judgment debtor to enjoin execution because of an existing set-off, the judgment creditor being insolvent. The lien was sustained and given priority despite the fact that the fee arrangement was oral and the assignment was made after judgment was rendered and was not filed with the papers of the suit, the court observing, however, that no elements of estoppel appeared in favor of the judgment debtor.

(b) *Vendors*

In *Dorsey v. Latham*[27] the court dealt with the priority of liens under the Business Sign Statute.[28] Appellant sold to a dealer certain automobiles on credit, thereby acquiring a vendor's lien which was held to attach although the automobiles were for resale in the course of the dealer's business. Thereafter, the owner of the building where the

[24]American Cotton Co-op Assn. v. Union Compress & Warehouse Co., 193 Miss. 43, 7 So. (2d) 537 (1942).
[25]194 Miss. 557, 11 So. (2d) 457 (1943).
[26]195 Miss. 547, 15 So. (2d) 364 (1943).
[27]194 Miss. 253, 11 So. (2d) 897 (1943).
[28]Miss. Code Ann. (1942) § 273.

business was conducted sued out an attachment for rent, under which the automobiles were seized, which resulted in the acquisition of an attachment lien. In this situation the dealer went into bankruptcy. The court held that both the seller and the landlord were common creditors of the dealer; that the vendor's lien was prior and that the Sign Statute had no application to derange the order of priority among creditors.[29]

(c) *Mechanic's Liens*

In the case of *Mississippi Butane Gas System Co., Inc., v. Glisson*,[30] the question presented had to do with the priority of a deed of trust on a house and lot as against the assertion by the gas company of a mechanic's lien on the realty, which was claimed to result from the installation of a gas system. Upon installation, the owner executed a conditional sales contract, providing that the system was to remain personal property with the title reserved in the seller. At this time, the deed of trust was on record. The court held that although the retention of title alone would not waive the mechanic's lien on the realty, yet in this case a waiver was said to result from the provision of the contract that the gas system was to remain personal property, this being inconsistent with the theory that the property became a part of the realty. The intention of the parties was held to control.

(d) *Stop Notice Priorities*

The case of *McNair v. M. L. Virden Lumber Co., Inc.*[31] involved the question of priority as among persons furnishing materials for a building under the so-called "stop notice" law.[32] The court held that the first to give notice or commence proceedings would not necessarily have priority over others within the same class, but that all would share pro rata in the funds held by the owner under the contract. However, it appeared here that the owner paid out no earnings subsequent to the first stop notice, hence the court did not consider a case where the owner (1) pays the balance to the first person giving notice before receiving notice from

---

[29]Inasmuch as the Sign Statute has been applied to defeat unrecorded conditional sales contracts (Durant Motor Co. v. Simpson, 160 Miss. 313, 133 So. 672 [1931]), the question will arise as to whether or not a vendor's lien may be asserted along with or in lieu of the rights under such arrangement. It would seem that the creditor may elect between the two securities, as to which see Mississippi Butane Gas System Co., Inc. v. Glisson, 194 Miss. 457, 10 So. (2d) 358 (1942), holding that the retention of title alone does not waive a mechanic's lien on realty if such lien would otherwise attach; Mechanics State Bank v. Kramer Service, Inc., 184 Miss. 895, 186 So. 644 (1939); Commercial Credit Co. v. Davidson, 112 F. (2d) 54 (1940); Superior Laundry & Cleaners v. American Laundry Machinery Co., 170 Miss. 450, 155 So. 186 (1934); Thompson v. Hill, 147 Miss. 489, 112 So. 697 (1927).

[30]194 Miss. 457, 10 So. (2d) 358 (1942).

[31]193 Miss. 232, 4 So. (2d) 684 (1942).

[32]Miss. Code Ann. (1942) § 372.

the others or (2) retains the amount specified in the first notice and pays the balance to the contractor before receiving notice from others. In either of these events, the result might, and certainly should, be different.

(e) *Release by Executing Bond*

It has been held that in the case of private building or construction contracts, the execution by the contractor of the statutory bond has the effect of releasing the entire proceeds of the contract untrammeled into the hands of the contractor, who may assign the same as against the claims of laborers and materialmen and as against the claim of a surety under subrogation.[33]

However, where such assignment expressly excepts the right of the surety to final retainage, the surety's rights under subrogation or later assignment will prevail as to such final retainage.[34]

(f) *Equitable Lien*

In *Pincus v. Collins*[35] it was held that where a building contractor enters into a contract to construct a building for a fixed price and provides therein that he "shall retain a lien" upon the building until the price is paid in full, the contractor becomes vested with an equitable lien created by contract, which lien may be foreclosed in equity as in the case of a mortgage. In such circumstances, the contractor is not restricted to the statutory mechanic's lien. The court said:

> Simply defined, an equitable lien, when created by contract, is the right by which a creditor is entitled to obtain satisfaction of his debt by resort to specified property belonging to the debtor, and no particular form of expression is necessary in such a contract so long as it is clear that the debtor intended to create the encumbrance.

(g) *Oral Mortgages*

In *Burton v. Atkins*[36] the court held that a chattel mortgage may be given by parol. Although the opinion does not state just how the question arose, it would appear that the controversy involved no innocent purchasers or questions of priority. Treating the question as a new one in this state and noting a conflict of authorities elsewhere, the court rejected the contention that the statute of frauds rendered the oral mortgage void, pointing out that the relation of the parties thereby created was not that of seller and buyer.

---

[33]Davis Co., Inc. v. D'Lo Guaranty Bank, 162 Miss. 829, 138 So. 802 (1932).
[34]Jackson Lbr. Co. v. Moseley, 193 Miss. 804, 11 So. (2d) 199 (1942).
[35]22 So. (2d) 361, 362 (Miss. 1945).
[36]24 So. (2d) 355 (Miss. 1946).

(4) Principal and Surety

There are many cases dealing with the right of various types of creditors to recover upon surety bonds given in connection with construction contracts which are expressly conditioned upon the prompt payment of persons furnishing labor, materials and equipment; but in *Hartford Accident & Indemnity Co. v. Hewes*[37] the question presented was the right of an insurance agent to recover insurance premiums against the surety for a highway contractor under the terms of a bond conditioned merely for the faithful performance of the contract, the agent having earned the premiums in question upon a policy of employer's and public liability insurance covering the contractor's operations. The original contract, for the faithful performance of which the bond was given, provided that the contractor would "carry" liability insurance; but subsequently by oral agreement and for a consideration deemed sufficient the contract was modified so as to require the contractor not only to carry the insurance but also to pay the premiums. It was held that the surety was obligated to perform the oral covenant to pay, thus included in the contract by oral modification. The principle established by this decision is that the surety upon a performance bond stands sponsor for its principal and is bound upon obligations assumed by the principal to third parties by the terms of the contract and within the scope of the work to be performed.

(5) Husband and Wife

A married woman who is living with her husband is not liable to third parties for such necessaries as the husband is required to furnish, in the absence of a promise or agreement on the wife's part to pay for the same.

In *McLemore v. Riley's Hospital, Inc.*[38] this rule was applied in reference to hospital expense resulting from the wife's emergency operation. The court denied recovery in a suit against the wife alone. At the time of filing suit, the husband and wife had separated; but the court held that liability is to be determined as of the time the expense is incurred. It was pointed out that in the absence of an agreement by the wife to pay, the husband is both primarily and exclusively liable. In order to bind the wife personally, it was said, the necessaries must be supplied on her individual credit. Also, if credit is given to the husband alone or to the husband and wife together, the wife is not liable.

---

[37]193 Miss. 850, 11 So. (2d) 309 (1943).
[38]197 Miss. 317, 20 So. (2d) 67 (1944).

On the other hand, as held in *Galtney v. Wood,*[39] cited in the opinion in the *McLemore* case, the same rule will be applied to deny a wife's claim, under similar circumstances, for such medical expense as an element of damages in a personal injury action.

In *Smith v. Smith*[40] it was announced generally that contracts made by a husband before marriage are enforceable as if the marriage had not taken place. Applying this principle, the court held that a mortgage executed by the husband before marriage on realty, which afterwards became the homestead, could be reformed so as to correctly describe the land intended to be conveyed, and that the wife was not a necessary or even a proper party to such proceedings.

(6) Sales and Implied Warranty

A cause of action upon an implied warranty did not survive the death of the buyer under the common law, and in *Hasson Grocery Co. v. Cook*[41] it was held that such action did not survive under Lord Campbell's Act. This case involved a suit upon the theory of implied warranty and was for damages on account of the death of plaintiff's husband, which was caused by eating a pie manufactured and sold by the defendant and said to have contained a poisonous substance. The court sustained a demurrer but was careful to point out that an action *ex delicto* was not precluded merely because the duty, for the negligent breach of which the action is brought, may arise out of contract.

(7) Breach of Contract

National Burial Association v. Wright[42] announced the general rule that "a party who has intentionally and persistently violated his contract cannot recover under it, and that he cannot revert to a quantum meruit because of the contract."

B. Public Contracts

Within this field, the court answered, among others, the following questions: Is the Highway Department subject to chancery attachment? May a municipality enter into a joint adventure? What are the conditions precedent to suit against a county? May the State's consent to be sued be withdrawn so as to defeat a pending action?

(1) Highways

Contrary to the previously existing views of the bar and the lower courts generally, the State Highway Department, a public corporation,

[39]149 Miss. 56, 115 So. 117 (1928).
[40]193 Miss. 201, 8 So. (2d) 461 (1942).
[41]196 Miss. 452, 17 So. (2d) 791 (1944).
[42]21 So. (2d) 589, 590 (Miss. 1945).

is now subject to chancery attachment, but in a very limited sense. In *Mid-South Paving Co. v. State Highway Commission*[43] the court held that the State Highway Department, having authority to sue and be sued, is subject to chancery attachment in reference to the claims of third parties against non-resident highway contractors to whom the department is indebted for public work. On suggestion of error,[44] the court took great pains to limit the decision to the facts in the particular case and by way of clarification restricted the right of attachment to instances where (1) the contract had been completed or practically so; (2) the creditor is a sub-contractor or otherwise involved in the prime contract under which the funds sought to be reached were earned, so as to have become a creditor therein of the non-resident debtor; (3) the fund has been or should have been released to the prime contractor; and (4) the funds have not in good faith been assigned to others.

This decision is unique in that the exceptions are so comprehensive as to destroy in practical effect the right which is theoretically given. Since "progress payments" are excluded and "final retainage" is invariably assigned in good faith to the contractor's surety, if not to a financial institution, it is difficult to imagine a case where the theoretical right could be enforced over the department's objection.[45]

Another case dealing with the liability of the State Highway Department is that of *State Highway Commission v. Wunderlich*,[46] wherein it was held that the department was liable for all compensatory damages for breach of contract. On suggestion of error[47] it was further established that the trial court may allow interest as a proper element of damages. The court declined to pass upon the question of whether the department was liable for interest *eo nomine* or as a matter of course, this being unnecessary to the decision.

(2) Municipalities

In *Bishopric v. City of Jackson*[48] the City sought affirmative relief against a contract with appellant. The contract was in the nature of a joint adventure arrangement under the terms of which appellant was to drill and operate certain gas wells on leases owned by the city and to share in the production. The court held: (1) that, since the arrangement

[43]197 Miss. 751, 21 So. (2d) 646 (1945).
[44]197 Miss. 751, 777, 22 So. (2d) 497 (1945).
[45]This writer, being of counsel in the *Mid-South Paving Co.* case, can certify that this same attachment was later dismissed by the Federal Court, to which the case had been removed, under the very exceptions set forth in the court's opinion on suggestion of error.
[46]10 So. (2d) 453 (Miss. 1942).
[47]194 Miss. 119, 11 So. (2d) 437 (1943).
[48]196 Miss. 720, 16 So. (2d) 776 (1944).

interfered with the city's obligations to the public, the contract was *ultra vires* and void; (2) that, since all persons are charged with knowledge of its limitations of power, the city was not estopped, despite the fact that it had received benefits from the transaction; and (3) that, since the city, like a private litigant, must do equity, the Chancellor was justified in conditioning relief upon the city's reimbursement of appellant for the expenditures in drilling and completing the wells.

(3) Counties

The court had occasion to reannounce the general rules governing the formation of contracts with counties. It was held that one deals with a county at his peril, that the county can contract and speak only by and through its minutes, that the minutes form the exclusive evidence of what was done, and a valid precedent entry is essential to the legality of any contract.

Applying these rules, the court decided that an entry on the minutes *nunc pro tunc* is insufficient to give validity to an executed contract.[49] Also, it was held that the minutes of the board must recite jurisdictional facts and must be properly authenticated.[50]

In this latter connection, the court held that the president of the board of supervisors must sign the minutes of each day before adjournment of the term and that failure to comply with this requirement renders the orders of the board void.[51] It is interesting to note that the two cases cited in the last footnote were decided under a statute[52] which provided that "The minutes of each day shall be read and signed by the president before the final adjournment of the board." For some mysterious reason, the 1946 legislature amended the statute to read "The minutes of each day shall be read and signed by the president *on the last day of the term* [Italics added] before the final adjournment of the board."[53] Since the court has held this statute to be mandatory, it would seem to follow that the president must now sign the minutes of each day upon the last day of the term and not before.[54]

---

[49]Martin v. Newell, 23 So. (2d) 796 (Miss. 1945).

[50]Clayton v. Paden, 21 So. (2d) 823 (Miss. 1945).

[51]Gardner v. Price, 197 Miss. 831, 21 So. (2d) 1 (1945); Brand v. Board of Supervisors of Newton County, 21 So. (2d) 579 (Miss. 1945).

[52]Miss. Code Ann. (1942) § 2886.

[53]Miss. Laws 1946, c. 305.

[54]It seems quite likely that the legislature misinterpreted the decision in the case of Brand v. Board of Supervisors of Newton County, 21 So. (2d) 579 (Miss. 1945), but this decision does not require that the president sign the minutes of each day prior to the recess of the board for that day but only that the minutes of each day be signed before final adjournment.

Given a valid contract with the county, the creditor is given adequate remedies for enforcement. A statute[55] provides that a person having a just claim shall file the same with the clerk for presentment to the board. If the board shall reject the claim in whole or in part, the claimant by this statute may elect to appeal to the Circuit Court or may bring suit against the county. Two cases dealt with the procedural aspects of this statute. In *Martin v. Newell*[56] it was held that a compliance with the statute was a condition precedent to suit against the county for the recovery of money paid on a void agreement for the sale and purchase of land. *In Clayton v. Paden*[57] it was said that an order of the board allowing a claim against the county must recite all jurisdictional facts, but that when a valid order is so entered the successful claimant is entitled to a mandamus against the clerk to compel payment of the claim so allowed.

(4) State

A right of action does not exist against the state except as expressly allowed by statute. In *Stone v. McKay Plumbing Company*[58] the court extended the immunity to an official of the state, to hold that money could not be recovered of such official, which, except for the action, would belong to the state. It was also held in this case that express statutory consent of the state to be sued does not create a contract and hence the consent may be withdrawn by the legislature at any time without constitutional hindrance, and this is so even to the extent that pending suits may be defeated. An action to recover a tax erroneously collected was said to be within the principles so announced.

II.

CRIMINAL LAW

*Fred B. Smith**

Through the years the path of the criminal law has been a much traveled thoroughfare. Every grade, every curve, every depression, and every detour has felt the step of the passing throng, and has been explored almost to a completion. There are few fields of the law in which this generation can expect a smaller number of new, novel, unusual and undetermined questions than in that of criminal jurisprudence. Most of

---

[55]Miss. Code Ann. (1942) § 2932.
[56]23 So. (2d) 796 (Miss. 1945).
[57]21 So. (2d) 823 (Miss. 1945).
[58]26 So. (2d) 349 (Miss. 1946).
*Member Mississippi and Tippah County Bars; Ripley, Mississippi.

the decisions of our court in criminal cases since September, 1942, have merely re-stated and re-applied age old precedents and principles. Therefore, in this review, we can only mention and briefly analyze a few of the cases which for one reason or another may have a claim upon the interest of the Bar.

Since human life is usually man's most prized possession, homicide cases ordinarily hold our primary interest. With the alarming increase in death from traffic accidents, we find more and more cases dealing with our culpable negligence homicide statute. The case of *Smith v. State*[1] is one of the leading cases on homicide growing out of a traffic accident. In that case the defendant immediately after having passed a truck going in the same direction, left the right side of the road, crossed over the center line and on a level stretch of highway, while traveling at a speed of forty-five miles an hour struck and killed a man standing on the extreme left-hand side of the road. The lower court, in instructing the jury, undertook to define "culpable negligence" as follows:

> . . . culpable negligence is that degree of negligence or carelessness which is denominated as gross, and which constitutes such a departure from what would be the conduct of an ordinarily careful and prudent man under the same circumstances as to furnish evidence of indifference to consequences.[2]

In holding that this instruction, under the circumstances, was erroneous to such an extent as to justify a reversal of the case, the court recognized the extreme difficulty involved in arriving at a correct definition of culpable negligence in this class of cases. While the court said that culpable negligence justifying a conviction for manslaughter in a traffic case must be a conscious and wanton or reckless negligence, the court further said that what in a given situation would be culpable negligence, that is to say, a wanton and flagrant negligence with disregard of the safety of human life or limb, must be determined by the facts and circumstances in each individual case, and that no comprehensive definition of culpable negligence could be given by the law writers which would be applicable to every kind and character of case. It was said that it would be palpably unjust that the same abstract definition of culpable negligence should be given to the jury in all cases as if there were no difference in them. The court said, however, that the term culpable negligence should be construed to mean a negligence of a higher degree than that which in civil cases is held to be gross negligence, and that it must be a negligence of a degree so gross as to be tantamount to a wanton

---

[1]197 Miss. 802, 20 So. (2d) 701 (1945).
[2]*Id.* at 811, 20 So. (2d) at 703.

disregard or utter indifference to the safety of human life and that this should be so clearly evidenced that there could be no reasonable doubt thereof.

In the case of *Bangren v. State*[3] several interesting questions were determined, and the court divided equally on a procedural question of considerable importance. On the procedural question the division of the court was so close that the Bar of the State may well expect to be confronted again with the problem involved. The defendant was the proprietor of a house of ill repute where men were invited to come and have dates with girls. A difficulty arose between the deceased and one of the girls, and the defendant requested the deceased to leave her house. He left, but shortly returned and was shot to death by the defendant. The defendant was convicted of murder and appealed. The court in reversing the case decided the following questions:

(1) That while malice is a necessary element in the crime of murder, it does not always follow therefrom that the existence of actual malice at the time of the slaying would necessarily have the effect of rendering a particular homicide a case of murder. That a person may be guilty only of manslaughter, or a homicide may be justified, even though the accused is mad and is bearing ill will towards his adversary at the time of the killing, if the act is done while resisting an attempt of the deceased to do any unlawful act or after such an attempt shall have failed, provided the anger or ill will is engendered by the particular circumstances of the unlawful act then being attempted. That is, if the killing is done while the defendant is resisting an unlawful act on the part of the deceased, or an attempt on the part of the deceased to commit an unlawful act, then to constitute murder the malice must precede the unlawful act which is being attempted or committed.

(2) The court further held that even though the defendant had invited the deceased to her house, she had a perfect right to revoke this invitation and to order him away, and when she did this it was his duty under the law to leave and not return.

(3) The court likewise held that the mere fact that the home of the defendant was a house of prostitution, and that the law was being violated therein, did not deprive her of the right to defend or protect it against unwarranted intrusions or trespasses.

The defendant was convicted of murder. The court held that the issue of whether or not the defendant was guilty of murder should not have been submitted to the jury, but that the issue to have been deter-

[3]196 Miss. 887, 17 So. (2d) 599 (1944).

mined by the jury should have been limited to the crime of manslaughter. Thereupon three members of the court took the position in dissenting opinions that since in the state of the record, the court would have allowed a conviction of manslaughter to stand, that the case should simply be reversed as to the degree of punishment. Those members of the court were of the opinion that the case should simply be reversed and sent back to the lower court, not for a trial again on its merits, but for the sentence of the defendant on a charge of manslaughter. Since however, this position did not receive the assent of a majority of the Justices, it was sent back to the lower court for a new trial on the merits.[4]

In the Code of 1942 there is a provision that has been embodied in the homicide statute of the State since its very earliest history, yet it has apparently been largely overlooked and very few cases have been presented involving its provisions. This paragraph reads in part as follows:

> The killing of any human being by the act, procurement or omission of another shall be excusable . . .
>
> (c) When committed upon any sudden combat, without undue advantage being taken, and without any dangerous weapon being used, and not done in a cruel or unusual manner.[5]

In the case of *Jeffcoat v. State*[6] a husband was being tried for the unfortunate killing of his wife. The facts revealed that after the husband and wife had retired, an argument arose over the age old problem of how the money of the family should be spent, the wife taking the position that some of the money which the husband then had should be spent on clothing for her. She began to search the room for the money, and finally came to the bed where the husband was, to search there; she grasped the husband by the hair, whereupon he struck her with his fist causing her to fall. It later developed that she was dead, that her neck was broken, and it was questionable as to whether the lick or the fall caused the break. The testimony indicated that the husband was profoundly distressed over the situation, and that he had had no intention of killing or seriously injuring his wife. In his defense the above quoted statute was used, and the question was whether or not the situation justified its application. Two members of the court took the position that the application of the statute to the facts as revealed by the record would justify a peremptory instruction in favor of the defendant. Two other members took the position that the decision of the lower court, convicting

---

[4]On the new trial, defendant was convicted of manslaughter; this conviction was affirmed in 22 So. (2d) 360 (Miss. 1945).

[5]Miss. Code Ann. (1942) § 2219.

[6]21 So. (2d) 8 (Miss. 1945).

the defendant of manslaughter should be affirmed because defendant's own version of what occurred revealed that he used a grossly excessive force, and in so doing became the aggressor. The other two members of the court took the position that the defendant would have been entitled to a peremptory instruction except for certain testimony of the sheriff contradicting his version of the occurrence. The case was reversed. Its chief interest lies in the fact that this old statute was used as a defense almost for the first time.

The truth of the old adage "An idle brain is the devil's workshop" is rather definitely established by the small number of cases reaching the Supreme Court during the war years, involving violations of the companion statutes of burglary, larceny, embezzlement and false pretenses. Ordinarily these are the most prolific source of criminal litigation, but in the past four years, when most of the people of the State have been busily engaged, and have been diligently applying themselves to the various employments and activities brought about by the war, a surprisingly small number of cases of this type have been determined by our highest court. In one of the few recently decided cases in that category, the court recognized the increasingly proficient methods of solving crime by scientific aids. And although the court in the case of *McLain v. State*[7] held that standing alone and unsupported by other corroborating proof of guilt, the finding and definite identification of a fingerprint on the rear-view mirror of a stolen automobile was insufficient to sustain a conviction for the larceny of the car, yet the court, speaking through Judge L. A. Smith, Sr., paid tribute to the recent growth of scientific methods in the solution of crime. It was said that:

> The use of scientific aids in the detection of crime has expanded and progressed tremendously all over the world. Peace officers and the courts have come to rely with confidence on the aid of technicians—the use of moulages in preserving and identifying footprints and tire treads, ballistics in tracing pistol and rifle balls to the gun from which they were fired. But of all the scientific aids the science of identification of people by the use of finger prints has become generally of the greatest value. A finger print has been called an unforgeable signature. We desire to declare here our confidence in finger prints as an aid in crime detection. It has been recognized for a long time by the courts, including our Court, "as admissible in evidence in order to establish the identity of a party where the comparison of a developed finger print with that of the party alleged to have made it is shown."[8]

---

[7]24 So. (2d) 15 (Miss. 1945).
[8]*Id.* at 16.

In recent years in a growing number of cases the drunkenness of the defendant has been advanced as a defense. The courts have uniformly held that voluntary intoxication is no defense to a crime, but they have likewise held that it may be a factor in determining whether a criminal intent was formed in the mind of the person charged. This was re-affirmed in the case of *Bullock v. State*,[9] in which the court said:

> While his drunkenness may be no defense, it must remain a factor in adjudging whether there was present a definite intent to steal. It is no condonation of the wanton and barbarous conduct of defendant to assert that while a larcenous intent could reasonably be inferred as a matter of logic, it may not be done as a matter of law.[10]

Freedom of speech has been declared by many to be the most fundamental right of man, lying at the very threshold of his liberty and independence. Freedom of speech and religious freedom, as guaranteed by the First Amendment to the Constitution of the United States, has been zealously guarded by the courts.

In the case of *Taylor v. State*[11] our court was called upon to determine the effect and pass on the constitutionality of Chapter 178 of the General Laws of 1942.[12] The defendant was indicted, tried and convicted under this Chapter. He was a member of the organization known as Jehovah's Witnesses, and the proof revealed he had made statements to the effect it was wrong to send our boys across the waters to fight in the war, that it was wrong to salute the flag, and that Hitler would rule the world. In the Supreme Court this case turned on the question of the constitutionality of the statute. There was an evenly divided court. The Judges whose prevailing opinion upheld the validity of the statute took the position that the words and acts of the defendant were calculated to encourage disloyalty to the Government, discourage enlistment in the Armed Forces of the Nation, and tended to create an attitude of refusal to support the war effort, or to honor, salute and respect the flag of the United States. On the question of the violation of the guarantee of freedom of speech, these Judges said it was an act passed in aid of the prosecution of the war, and to meet conditions arising out of it, and that in time of war things which might in time of peace be permitted and tolerated, must be prevented and prohibited in order to further the all important cause of victory. They held that it was a war of all the people, not only those in the military service, and that the morale of the people,

---

[9]195 Miss. 340, 15 So. (2d) 285 (1943).
[10]*Id.* at 344, 15 So. (2d) at 286.
[11]194 Miss. 1, 11 So. (2d) 663 (1943), *reversed,* 319 U.S. 583, 63 S.Ct. 1200, 87 L.Ed. 1600 (1943).
[12]Miss. Code Ann. (1942) § 2402.

their willingness to help financially and by personal effort, their support of and belief in and respect for the Government, were absolutely essential to the successful prosecution of the war, and that the Legislature had this situation in mind in the enactment of the law in question. On the other hand the three dissenting Judges took the position that freedom of speech was too important, too fundamental, too basic, too essential to the liberty of mankind, to be temporarily weakened for any reason, regardless of how urgent that reason might appear at the moment.

The conviction of the defendant was sustained by this equally divided court, and the case went to the Supreme Court of the United States.[13] The latter court held that the Act violated the Constitution of the United States.

In a criminal trial the matter of venue is always important. There is no new question in the case of *Holloway v. State*,[14] but it is interesting to note that in that case the court re-asserted the principle that venue may be shown by circumstantial evidence, and that the court will take judicial knowledge of the location of towns and county sites, to aid in the establishing of venue.

The liquor question is ages old; primitive man somehow developed a method of producing intoxicating drinks. From the dawn of history the problem of strong drink has confronted the human race. Neither prohibition laws nor legal control have ever solved the problem. Mississippi is one of the three prohibition states in the Union, and yet liquor freely flows in our midst, carrying with it one of the chief sources of criminal litigation. During the past four years numerous cases involving the intoxicating liquor statute have been before our court, however nothing especially new or out of the ordinary has been involved in any of these decisions. One case of considerable interest was that involving the validity and legality of an election held in Lauderdale County, Mississippi, on the question of prohibiting the sale of light wines and beers. This case was before the court three times.[15] Under the statute,[16] in order to inaugurate proceedings to outlaw the sale of light wines and beers, it is necessary that a petition of twenty percent of the qualified electors of the county be filed with the Board of Supervisors. In this case a petition was filed, a hearing was had before the Board of Supervisors to determine whether or not it was signed by twenty percent, and at this hearing

---

[13]319 U.S. 583, 63 S.Ct. 1200, 87 L.Ed. 1600 (1943).

[14]24 So. (2d) 857 (Miss. 1946).

[15]Costas v. Board of Sup. of Lauderdale County, 196 Miss. 104, 15 So. (2d) 365, 154 A.L.R. 863 (1943), *sug. error sus.* in part, 196 Miss. 104, 124, 16 So. (2d) 378 (1944); 22 So. (2d) 229 (Miss. 1945).

[16]Miss. Code Ann. (1942) § 10208.

some of the parties interested in retaining the right to sell light wines and beers in the county, appeared and were heard. The Board of Supervisors adjudicated that it was signed by the required twenty per centum of the qualified electors, and an election was called and held and carried favorable to outlawing the sale of wine and beer. When the final order of the Board of Supervisors was entered in this regard, the protestants appeared and raised the question that the original petition had not been signed by the required twenty per cent of the qualified electors. The question involved was whether or not that issue could be raised at the final hearing in the matter, or whether it was already adjudicated and concluded in the first order of the Board of Supervisors determining that the petition was signed by twenty per centum of the qualified electors. In the three decisions hereinbefore referred to the court held that the first order of the Board of Supervisors, adjudicating that the petition was signed by twenty per centum of the qualified electors, was merely an interlocutory order, not appealable, and did not preclude the parties from thereafter challenging the Board's adjudication. The court determined that although the Board was acting judicially, it did not thereby complete the exercise of its judicial functions, and that it was a prerequisite to its final order that the Board again adjudicate that the issue to be voted on was properly submitted by a petition signed by twenty per centum of the qualified electors. Therefore, it was held that an appeal on that issue could be taken from the final order of the Board after the holding of the election. The court further held that the appellants were not estopped from protesting the order of the Board excluding traffic in light wines and beers, following the election on such issue, on the ground that the petition for the election did not contain the required twenty per centum of the qualified electors, merely because other protestants who were not in privity with the appellants had appeared before the Board of Supervisors and contested the sufficiency of the petition when the Board adjudicated it to be sufficient.

War is a terrible thing, and ordinarily there are very few benefits that can be traced to it. However, in reviewing the criminal cases presented to our Supreme Court in the past four years we are made to realize that a war, otherwise utilizing the energies and interests of the people, lessens the crimes reaching the courts. We feel sure that not since the first World War has there been during a comparable period such a dearth of criminal cases.

III.

EVIDENCE

*John H. Fox, Jr.**

Problems of evidence can be found in nearly all reported cases; hence, a survey of evidence cases necessitates a virtually complete reading of the Reports for the years to be covered. Limitations of time and space of course make it impossible to include all of those decisions which deserve mention. Only a very slight effort has been made to group cases according to separate topic headings of evidence; the arrangement is chiefly chronological.

In *Smith v. State*[1] defendant was convicted of murder of one Johnson. Besides the defendant there were two eye witnesses, his wife and one Mildred Walters. The opinion does not specify the defense, but states that defendant killed deceased when deceased rushed out of the kitchen cursing, and that the defendant knew he had killed two people and he was afraid of him. The testimony showed that defendant's wife had left him to live with the deceased and the witness Mildred Walters. The homicide occurred at the kitchen door of the deceased's home late at night. Defendant testified that he had gone to deceased's home to induce his wife to return. The state's theory was that he had gone there with the purpose of killing Johnson. Over objection that it was "incompetent, irrelevant, and immaterial," Mildred Walters was allowed to testify that on a previous occasion when defendant went to Johnson's home to induce his wife to return, his wife had stated to defendant in the presence of Mildred Walters that "she was not going back home because he would not let her live at home and that she was going to get a divorce." Although the point was not made at the trial, the conviction was reversed on the ground that it violated the statute which renders a wife incompetent to testify against her husband. And this, in spite of the fact that the majority opinion admitted for the purpose of their decision, that the testimony of the defendant himself proved him to be guilty. The majority opinion bluntly stated holds that Mildred Walters, a woman *not the wife* of appellant was rendered incompetent to testify against a person *not her husband* under a statute which prohibits a wife from testifying against her husband. The Court argues that "if the wife could not have so testified personally and directly, she could not be made a witness nor the testimony made competent in this indirect and hearsay manner." No

---

*Professor of Law, University of Mississippi.
[1]193 Miss. 474, 10 So. (2d) 352 (1942).

citation of authority is given for this ruling, although there are citations to show that such testimony was "naturally very damaging to the defendant." One of the "authorities," *Garner v. State,*[2] held simply that a witness could not testify that he had heard the wife say the defendant committed the murder, when there was no pretense that the wife had witnessed the crime. This would of course be pure hearsay, while in the instant case the woman witness merely testified that she knows of her own knowledge that the wife had refused, on a previous occasion, to go home with defendant. This, although we may doubt its materiality, is in no sense hearsay. In *Pearson v. State,*[3] another "authority" cited in the instant case, the court held that the rape prosecutrix, defendant's daughter, could not testify that she had heard statements made by defendant's wife in which the wife stated that defendant was guilty of the rape. This, of course, should have been ruled out on the ground that it was hearsay. The Court held however that this was error because "the wife could not have been introduced herself to testify that she had charged defendant with the crime; and *a fortiori* the prosecutrix could not testify that her mother had accused him."

It is respectfully submitted that because the accused cannot be compelled to testify personally and directly against himself, no court would hold that a witness who repeated a statement made by the defendant such as "I killed him" would be "making him a witness or the testimony competent in an indirect and hearsay manner." It would be no answer to this to say that this is an exception to the hearsay rule.

A negro cook or any witness would, of course, be prohibited from testifying that she heard defendant's wife say that defendant killed him, but this would be because of the fact that it was hearsay and *not because* of the fact that a Mississippi statute which prohibits a man's wife from testifying against him, *also* prohibits his unmarried negro cook from testifying as to material facts or statements of the wife which the witness knows of her own personal knowledge.

In the *Pearson* case, had the prosecutrix testified that she was present when her mother, the defendant's wife, charged him with the rape of their daughter and that he remained silent or admitted the charge, this would have been admissable as a confession or in the nature of an admission. Could anyone claim this violated a statute which gives a man a privilege that his wife shall not *testify*. If so, with an imagination so flexible it

---

[2]76 Miss. 515, 25 So. 363 (1899).
[3]97 Miss. 841, 53 So. 689 (1910).

would certainly be possible also to stretch this situation into a "controversy between them."

In *Hawkins v. State*[4] defendant was indicted for burglary. The state offered a confession which defendant claimed was involuntary. On the preliminary inquiry, to determine its voluntary nature, the jury having retired, defendant took the stand and testified that the confession was involuntary. Without objection, the prosecuting attorney conducted a *112 page* cross-examination of the defendant on the question of his *guilt on the merits.* The state was allowed to introduce the confession and thereafter was permitted to call the court stenographer, who read to the jury the 112 page stenographic notes of cross-examination of defendant as to his guilt on the merits. In an interesting qualification of the Mississippi rule that an accused who "takes the stand" for any purpose is a witness for all purposes, the Court held that the defendant by testifying on the merits, without objection, on the voluntary inquiry, was *not* "taking the stand" and did not thereby waive his privilege of not testifying on the merits. An objection made when this testimony by the court reporter was offered the jury, was held sufficient. This presents an interesting question as to what would have been the ruling if an accused voluntarily during an intermission of the court, in the absence of the jury, had made the statement "I committed the burglary, but you can't prove it on me because I am not going to take the stand," and the question of whether sitting by without objection for 112 pages of cross-examination doesn't make whatever he said on cross-examination equally as voluntary a confession as if it had been made in intermission or out of court.

In *Seward v. First National Bank of Meridian*[5] one Seward owned certain bonds of Newton County which were being refunded. The Irving-Harris corporation was designated by the Board of Supervisors to handle the delivery of a refunding issue of bonds to take up the series of bonds of which Seward's bonds were a part. Seward sent his bonds to the defendant bank with specific instructions to "deliver my bonds to the Irving-Harris corporation and take in exchange therefor bonds which they will deliver to you." The defendant bank delivered the old bonds to the corporation and received from them forged bonds. Seward brought suit against defendant bank to recover the face value of his old bonds claiming that the bank was negligent in accepting forged bonds. This service on the part of the bank was for hire. On the trial certain highly inflammatory and prejudicial testimony was admitted concerning plaintiff's personal business methods and occupation. Both the majority and

[4]193 Miss. 586, 10 So. (2d) 678 (1942).
[5]193 Miss. 656, 8 So. (2d) 236 (1942).

the dissenting opinions admit this was error. The majority opinion states that the "writer of the opinion and the Chief Justice" feel that the court below should have given the defendant bank a directed verdict and that the admission of this inflammatory evidence was error but harmless, "in view of the fact that the great preponderance of the evidence was in favor of the verdict for the defendant." Two justices dissented. No statement is made as to what the other two justices thought on the question of a directed verdict. Apparently they did not think it a directed verdict case or their opinions would have been included with those of the opinion writer and the Chief Justice. It is respectfully submitted that if the majority opinion is a ruling that the bank should have had a directed verdict (as to which question the other two judges are silent) then the admission of this inflammatory testimony might conceivably be harmless, but on the other hand if the verdict is approved simply on the ground that the preponderance of the evidence was in favor of the verdict but defendant was not entitled to a directed verdict since a reasonable jury might be warranted in returning a contrary verdict, then the admission of this highly inflammatory testimony was reversible error.

In *Odom v. Walker*[6] plaintiff sued for personal injuries to his neck causing him, during the trial, to wear a high collar made of stiff leather and steel, which prevented him from moving his head. Eleven jurors had been selected when the court took a recess, allowing the jurors to separate but advising them not to talk to others or permit others to talk to them about the case. On re-convening, defendant's counsel asked the eleven whether any one had talked to them about the case. One of the eleven stated, "We was down here in the courtroom and some man, I don't know who it was, but he said a man was being tried that had his neck broke, that he was trying the contractor and the insurance company for $20,000"; that he was not acquainted with this man, and the man was not trying to talk to him. The court overruled a motion to discharge the entire panel who had heard this statement and on appeal the case was reversed. The majority opinion states that "evidence or statements of this nature is error." It is supposed that the majority meant that a court which did admit evidence of this nature would commit error. This of course was not done. The statement "evidence of this nature is error" states no rule of law. Both the majority opinion and a sarcastic dissent held forth for the proposition that the courts should apply rules aided by common sense. This decision raises the interesting point as to whether it would be permissible on voir dire examination for the defendant's attorney to ask the question, "Have any of you jurors heard

[6]193 Miss. 862, 11 So. (2d) 452 (1943).

anyone say that the defendant is insured in this case?" If this question is permissible, and any juror who knew of the insurance, if he answered truthfully, would disqualify not only himself but the entire panel and all by-standers in the court. If this question is not permissible, one wonders how a lawyer would bring out such a disqualifying fact, and under the rule of this case whether defendant's counsel is not given a device by which he may forever postpone the trial by merely asking the question.

In *Hoxie v. Hadad*,[7] a personal injury action where there were *three* witnesses for the plaintiff, the following instruction was given for the defendant: "The court instructs the jury for the defendant that if you believe from the evidence that any witness who has testified in this case is interested in the result of this suit as a party or otherwise, then, in determining the credit to be given such witness, the *jury may take into consideration such interest as the evidence shows* such witness had, together with all the other facts and circumstances disclosed by the evidence, if any, which will aid the jury in arriving at and determining the credit to which the testimony of such witness is entitled." (Emphasis added) The Appellate Court stated that they did not defend this instruction but rather "disparaged its use," and stated that it violated the Code section[8] which forbids comment by the trial court on the weight of the evidence and that this instruction "while declaring self-evident generalizations, makes no contribution to the power and prerogatives of the jurors whose experience and common sense make of it a truism." They commend a trial court for refusal to give such instruction, but hold that its granting is "harmless error." Since the legislature has seen fit, contrary to the common law, to declare that any witness may be examined touching his interest in the cause,[9] it is interesting to wonder why a trial court should be criticized for advising the jury of this change in the law whereby the interest which the evidence may establish can be considered by them. Advice that interest may be considered is not commenting on the weight to be given it by the jury. It is submitted that in the instant case, the trial court with this instruction has not commented upon the *weight* of the evidence but has simply instructed the jury that if they find a fact to be true, that is, that a witness is interested, then without any instruction from the trial court as to what weight the jury should give this testimony the court tells them that in making up their minds as to the weight they will give to it, they may consider this fact found by them, together

---

[7]193 Miss. 896, 11 So. (2d) 693 (1943).
[8]Miss. Code Ann. (1942) § 1530.
[9]*Id.* § 1693.

with all other facts found by them from the evidence. The Court cited two cases as authority for the proposition that a similar instruction had been condemned. It is submitted that the cited cases condemned *very dissimilar* instructions. For instance, in *D'Antoni v. Teche Lines, Inc.*,[10] the Court condemned an instruction where the trial court told the jury that one set of witnesses were interested and one set of witnesses were not interested. Clearly such an instruction finds the fact of "interest" for the jury instead of as in the instant case leaving the fact of "interest" for the jury. Also in the cited case of *Potera v. City of Brookhaven*,[11] the Court instructed the jury that because a certain witness had lived in a city where they had electric lights all of his life, that such a person should be held to be more aware of the danger from electric light wires. This is of course argumentative and advises the jury why and to what degree and what weight to give to evidence. In *Jones v. State*,[12] a case not cited either in the briefs or the opinion of the instant case, the Court states: "Appellant next assigns as error the action of the court in granting an instruction which told the jury that, in determining what weight they should give to the testimony of any witness, they had the right to take into consideration the interest such witness may have had in the result of the trial, if any such interest had been shown by the testimony in the case. It has been decided by this court in a number of cases (no authorities cited) that, where the defendant is the *only witness* testifying in his own behalf, this instruction is erroneous and, while the defendant did not testify in this case, counsel contends that this instruction singles out the wife of the defendant, and *that the rule applies as well where the wife of the defendant is the only witness* testifying to material facts in her husband's defense. *We do not think that this contention is maintainable.* The wife occupies the same position as any other witness, and . . . any witness may be examined touching his interest in the case."[13] (Emphasis and parenthesis added) It is submitted that *Jones v. State* is incompatible with the rule announced in the instant case.

In *Crowell v. State*[14] the Court held that it was improper in a case for receiving stolen goods knowing them to be stolen, to instruct the jury that unexplained possession of stolen property is a circumstance from which guilt may be inferred or a circumstance strongly indicative of guilt, "where such possession is unaided by other proof." It is respectfully submitted that under the rule announced in *Hoxie v. Hadad, supra,*

---

[10]163 Miss. 668, 143 So. 415 (1932).
[11]95 Miss. 774, 49 So. 617 (1909).
[12]130 Miss. 703, 94 So. 851 (1923).
[13]*Id.* at 714, 94 So. at 853.
[14]195 Miss. 427, 15 So. (2d) 508 (1943).

the qualifying clause, "where such possession is unaided by other proof" is unnecessary and erroneous in that it indicates that where possession *is* aided by other proof such instruction is proper. In other words, if an instruction stating that the established fact of interest may be considered to determine credibility is "on the weight," then it would seem that an instruction that the established fact of possession may be considered to determine guilt is also an instruction "on the weight" under any circumstances, whether aided or unaided by other proof.

A doubtfully hopeful tendency away from the narrow interpretation of the statute prohibiting judicial comment "on the weight" is found in *Clary v. Breyer,*[15] where an instruction was requested that if the jury believed plaintiff's doctor was available and not produced, then the presumption is that his testimony would have been adverse to the plaintiff. Instead of *condemning outright* this instruction, it was stated that it was the "writer's opinion" that it violated the rule against instructing on the weight of testimony and also beyond the bounds allowed in *Killings v. Metropolitan Life Insurance Co.,*[16] but nevertheless held the instruction improper only on the ground that the patient had effectively waived her privilege.

A reversion to type however is found in *Dolan v. State,*[17] in which the Court reaffirmed its former position holding improper as one "on the weight" the "falsus in uno" instruction whereby the jury is informed that if they believe that any witness on the trial has sworn falsely to any material fact, they may disregard entirely the testimony of such witness.

State and federal constitutions create a situation where the *criminally accused* is given the privilege of either calling or not calling himself as a witness.[18] The common law established and Mississippi approved a privilege to any *client* to allow or not allow his attorney to testify as to confidential communications. The Mississippi legislature created a like privilege to a patient to allow or refuse to allow his physician to testify as to confidential communications.[19] The common law and the Mississippi legislature also created a like privilege in regard to *spouses,*[20] and there exists at law several other such privileges and options. It is *only* in the *criminally accused situation* that the legislature has seen fit to attempt to prohibit unfavorable inferences to be drawn by the jury or to

---

[15]194 Miss. 612, 13 So. (2d) 633 (1943).
[16]187 Miss. 265, 192 So. 577, 131 A.L.R. 684 (1940).
[17]195 Miss. 154, 13 So. (2d) 925 (1943).
[18]U. S. CONST. AMEND. V; MISS. CONST. (1890) § 26.
[19]MISS. CODE ANN. (1942) § 1697.
[20]*Id.* § 1689.

prohibit counsel from commenting on the exercise of such privilege. Nevertheless the Mississippi Court has in *Genola v. Ozburn*[21] extended the sole statutory prohibition against inferences and comment, so that no unfavorable inference shall be drawn from the fact that one spouse does not call another as witness. In *Killings v. Metropolitan Life Insurance Co.*[22] the Court had indicated very strongly that the same rule would apply to the attorney-client situation. In that case, after commenting upon the relative value to our society of spouses, attorneys, and physicians, and finding that "our civil society reached its flower in a hundred years of development in this state before the physicians' privilege statute ever became a part of our law," and that lawyers and husbands "affect the public peace, order and welfare," it was held that a former contrary rule in Mississippi should be reversed and that inferences may now be drawn for failure to call a physician in the physician-patient situation. These bits of judicial legislation are (except for the *Killings* case) contrary to the proposed Model Code of Evidence of the American Law Institute where in rule 233 it is stated: "If a privilege to refuse to disclose or a privilege to prevent another from disclosing a matter is claimed and allowed, the judge and counsel may comment thereon, and the trier of fact may draw all reasonable inferences therefrom." Of course the Mississippi statute which mummifies the *trial judge* as to all comment on the evidence would apply here, but since the legislature must surely have known of all their statutes creating these privileges and saw fit to single out *only the criminally accused situation* in prohibiting comment by *counsel,* and unfavorable inferences, it is submitted that a legislative intent contrary to the Supreme Court interpretation is obvious. Of course also any attempt to prohibit *unfavorable inferences* by the jury is an attempt at omnipotence.

In *Brashier v. State,*[23] a prosecution for possession of intoxicating liquor, during the course of the trial the trial judge took the stand and testified as to a pretrial conversation between the judge and the defendant which was in the nature of an admission or a confession. No objection was made until after the judge had finished testifying but immediately thereafter there was a motion to strike or for a mistrial which was overruled. It was held that this was reversible error and that a trial judge was incompetent to testify upon the merits and that the functions of the judge and witness were incompatible. It was stated that if the trial judge has notice that he will be a witness, he should excuse himself

---

[21]194 Miss. 235, 11 So. (2d) 910 (1943).
[22]187 Miss. 265, 192 So. 577, 131 A.L.R. 684 (1940), cited *supra* note 16.
[23]197 Miss. 237, 20 So. (2d) 65, 157 A.L.R. 311 (1944).

and in the absence of notice, he should refuse to testify. The Court stated that defendant was excused for "being at a loss to know just what to do and how to proceed" on the ground that this was "an unexpected and unusual situation." That the rule of the instant case is the general rule is shown by the annotations to this case,[24] where are found hundreds of cases to the same effect without the aid of a statute, from some twenty jurisdictions. It is interesting to note that in the instant case the Court was aided in reaching their conclusion by our statute[25] which prohibits the trial judge from summing up or even making comment on the testimony or charging as to the weight of the evidence and therefore *a fortiori* he should not be allowed to *testify* in contradiction of the defendant's testimony. It is submitted that while this decision is eminently correct, with or without the statute, the statute itself together with the restricting interpretations by our Court has reduced a Mississippi trial court to practically a dumb automaton whose vocabulary as far as the jury is concerned consists of the two words, "sustained" or "overruled."

In *Fry v. State*[26] the Court held in a rape case that where there was no substantial conflict in the evidence as to the guilt of the accused, a comment by the district attorney on the failure of the accused to testify was "harmless error." The various state statutes including that of Mississippi[27] which prohibits comment upon the failure of the accused to take the stand have universally been adopted and upheld as necessary in order *to protect the constitutional right* of an accused not to take the stand or testify against himself. In *McCulloch v. State*[28] the Court re-affirmed their oft-repeated rule that *"the violation of a constitutional right cannot be harmless error."*

In *Powell v. State*[29] the prosecutrix was permitted to identify otherwise authenticated photographs of the scene of the crime for the purpose of establishing venue. On appeal the admissibility of this evidence was upheld but the language of the Court is confusing where it is stated that "it is assigned as error that by the use of these pictures the state violated the *well-established* rule that details of this crime may not be shown by the complaint or report of the prosecutrix. Counsel has misapplied *this rule which prohibits* the state from showing any statement made by

---

[24]157 A.L.R. 315.
[25]Miss. Code Ann. (1942) § 1530.
[26]194 Miss. 603, 13 So. (2d) 621 (1943).
[27]Miss. Code Ann. (1942) § 1691.
[28]194 Miss. 851, 13 So. (2d) 829 (1943).
[29]195 Miss. 161, 13 So. (2d) 622 (1943).

her except the mere complaint that she had been violated. *The rule* is an admitted exception to the hearsay rule and is allowed for the purpose of permitting the victim of such outrage from being discredited by interferences [sic] which would stem from her silence."[30] (Emphasis added) It is submitted that there is no rule which prohibits the prosecutrix in a rape case from giving *any* evidence. The hearsay rule prohibits other witnesses from repeating what they have heard the prosecutrix say when offered to prove the truth of the repeated statements. A "so-called exception" to the hearsay rule permits a witness to testify that he heard the prosecutrix "make a complaint." The prohibiting rule is not an exception to the hearsay rule but the hearsay rule itself. Permitting a witness to state that he heard the prosecutrix make a complaint is not an "admitted exception" to the hearsay rule since the witness is not testifying as to the truth of the words spoken by the prosecutrix but is simply testifying that of his own knowledge prosecutrix made a complaint, true or false. In a libel case a witness who says "I heard the defendant say plaintiff was a thief" is not giving hearsay testimony since it is not admitted for the purpose of proving that plaintiff *is* a thief. Nor is a witness' testimony that he heard prosecutrix say defendant raped her admitted to prove that defendant raped her, but only to rebut unfavorable inferences that might arise from the fact that she never made complaint, and this the witness knows of his own knowledge and not from hearsay.

In *Vaughan v. Vaughan*,[31] General Vaughan married first Mary Cross, second Agnes Green, and third Amelia Nicholson; he married fourth Annie Claiborne, and then died intestate. Amelia Nicholson prior to her marriage to Vaughan had been married to one Nicholson. Amelia Nicholson filed a petition in Vaughan's estate claiming to be his wife and that Annie Claiborne was not. There was no proof that Vaughan had ever been divorced from any of them. There was no proof that Amelia had ever been divorced from Nicholson. The Court held that the marriage of Amelia Nicholson to Vaughan raised "the strongest presumption known to law" that the marriage of Vaughan to Cross and Green and the marriage of Amelia to Nicholson had been dissolved or the necessary spouses dead and that the *burden of producing evidence was on Annie Claiborne to show that the marriage of Amelia to Nicholson had not been dissolved* even though Nicholson was proven to be alive. There was proof that Amelia had never brought suit for divorce against Vaughan and that he had never sued her in Mississippi. There was no proof that Vaughan had never obtained a divorce from Amelia else-

[30] *Id.* at 165, 13 So. (2d) at 622-623.
[31] 195 Miss. 463, 16 So. (2d) 23 (1943).

where. In the opinion of the Court, that fact was not stated; but in the brief of the appellee the statement was made that "it would be foolish to presume that any attorney employed by General Vaughan would have consumed the unnecessary time and expense of going into Tennessee to sue for divorce instead of in Mississippi, Amelia's home." However, the brief apparently assumed that it was *possible that Vaughan could have sued her in Tennessee where she might have established a residence.* If the Vaughan to Amelia marriage raised "the strongest presumption known to the law" that all of the previous marriages were dissolved, it is difficult to see why the appellant, Annie Claiborne Vaughan, would not be entitled to an equally "strongest presumption known to the law" that by her marriage to Vaughan the previous marriage of Vaughan to Amelia had been dissolved; and that this presumption equally could not be overcome by proof that Amelia never sued Vaughan and that Vaughan never sued Amelia *in Mississippi,* coupled with a mere assumption that Vaughan never sued Amelia in Tennessee because it would be foolish. Why is it that the burden both of producing evidence and of persuasion was not upon the petitioner, Amelia to overcome the presumption of validity of Annie's later marriage by clear, strong and convincing proof that Vaughan never sued for divorce in Tennessee or elsewhere?

In *Phillips v. State,*[32] when certain evidence was offered, only the following facts according to the opinion of the Court had been proven. On a certain night, the home of one Broom was burned to the ground. Broom was about 82 years old. His wife had been dead seven years. His home was in the country. He had lived alone. He did the necessary work about his home including cutting firewood. He sometimes walked several miles. He was unusually active physically and mentally for a man of his age. He had a pistol which he ordinarily kept under his pillow on his bed and an axe which he kept about the place. After the fire the pistol could not be found and the axe was found several hundred yards away from his home. His burned and charred remains were found in front of the fireplace where he habitually sat and nearby his bunch of keys and pocketknife. The fire took place between 8 and 9 o'clock at night. About 3 o'clock that afternoon one of his grandsons who lived near brought his supper which was prepared and sent by his daughter, the mother of the child. The grandson remained with him until 4 or 5 o'clock when he went back home. When the grandson left, Broom was in the yard cutting firewood with the axe. He was never seen by anyone after that. His physical and mental condition was such as to indicate that if the fire was accidental he would have extinguished it before any

[32]196 Miss. 194, 16 So. (2d) 630 (1944).

harm was done. These was the only facts given in the opinion as having been proven at the time the objected testimony was offered. Query: Was the corpus delicti proved? The Court states that "the evidence was sufficient to show that the fire and Broom's resulting death were of incendiary origin." The evidence which was offered and objected to at this time was a confession by the defendant that he had murdered Broom. Objection was on the ground that the corpus delicti had not been proven. It seems certain that at that time there was absolutely no evidence connecting the defendant with the crime. It is certainly doubtful that the admitted evidence at that time showed by a preponderance of the testimony that *any* crime had been committed and it is doubtful on the facts stated whether there was a scintilla of evidence that *any* crime had been committed. Certainly under the facts above given, defendant's innocence and all other persons' innocence is reasonably consistent with the facts which the Court held to prove a corpus delicti. It is certainly a warrantable conclusion from the above facts that the pistol was not stolen but was either simply not found in the burned debris or had been previously disposed of. It is certainly a warrantable conclusion that Broom after 5 o'clock took his axe several hundred yards from home to cut wood and left it there. It is certainly a warrantable conclusion that an 82-year-old man, as was habitually his custom, sat before the fire, dozed off to sleep and never awakened when the house caught on fire and of course his keys and knife might have been found anywhere around his home. It is certainly an unwarrantable conclusion at this state of the evidence to connect defendant in any way with the death of Broom whether accidental or murderous and the only evidence connecting defendant or any other criminal agency with Broom's death was the confession, which the Court used in finding a corpus delicti by saying that the axe was found where one of the confessors said it would be found. The Court did not tell us in the opinion what facts were sufficient to show that the fire and death were of incendiary origin as above stated. It is submitted that a present declaration by the Court defining corpus delicti in Mississippi should be helpful.

In *Heafner v. State*[33] the defendants Heafner and Shaw were both indicted for murder but were tried separately. On Heafner's trial, the state introduced evidence that the alleged murder was committed by the two defendants after leaving a road-house at one o'clock in the morning in company with a Mrs. Hunt and the deceased. On Heafner's trial Shaw testified on cross-examination that they both left the road-house

[33]196 Miss. 430, 17 So. (2d) 806 (1944).

and returned to Coffeeville not later than 11 o'clock. The sheriff over objection was permitted to testify that the next morning Shaw told him that he was present at the road-house after 12 o'clock. The opinion does not show the ground of the objection but the brief of the defendant states that it is "not competent to contradict or impeach a witness about an immaterial or collateral matter." Apparently there was no request to charge the jury as to the purpose for which this evidence was admissible. The Court held that Shaw's presence at the road-house was a material issue on Heafner's guilt and that Shaw's statement to the sheriff was in effect a contradiction of his alibi testimony, and then cited the rule that "testimony as to a substantive relative fact *whether brought out on direct or on cross-examination* may be *contradicted* by proof of unsworn statements made out of court." (Emphasis added) Admitting for the purpose of the case that Shaw's presence at the road-house was a material fact and issue on Heafner's guilt, nevertheless, while it is quite true that a witness may be impeached as to credibility by showing a prior contradictory statement out of court as to a material relevant fact, that is an entirely different proposition from saying that the prior inconsistent statement may be introduced for the purpose of showing that Shaw (and therefore inferentially Heafner) was present at the road-house. If we're still going to play by the historical fetish rules prohibiting hearsay and continue to instruct juries to do the psychologically impossible instead of adopting Rule 503 of the Model Code of Evidence, defendant Heafner would at least have been entitled to an instruction that the sheriff's testimony was admissible, if at all, only for the purpose of discrediting and impeaching the credibility of the witness Shaw and could not be used by them in determining the question of whether Shaw (and Heafner inferentially) was in fact at the road-house. In other words it would seem that the Court in allowing the sheriff's testimony for the purpose of showing by Shaw's out of court statement that Heafner was at the road-house, is treating Shaw's statement to the sheriff as if it were an admission by Heafner through his agent or accomplice Shaw, and, by the nice embroideries of the hearsay rule. an admission by an agent or accomplice is not admissible as an admission unless it is shown that the agent or accomplice was authorized to make the statement. On the other hand, of course, since defendant failed to restrict this hearsay prior inconsistent statement to its proper function, the court would be justified in allowing it to go to the jury for the purpose of proving the truth of the statement made by Shaw and for proving all other proper inferences. *Quaere:* If two persons both testify that they were not at a road-house and proof is made that one of these persons has made a prior

inconsistent statement in which he stated that he was at the road-house, does that have a logical relevant tendency to prove that the other was at the roadhouse?

In this case also the court re-affirmed its position taken in *Archer v. State*,[34] which position had its origin in this state in *Brown v. State*,[35] where it was held that it was reversible error for the district attorney to comment upon the failure of the defendant to introduce as witnesses *defendant's father and brother* who were available to be called by the district attorney, and further stated that the failure of either party to examine a witness "equally available" to both offers no foundation for a prejudicial inference either in civil or criminal cases. As indicative of the fact that this position is contrary to the modern trend the following quotations from Wigmore are submitted: "The nonproduction of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its *tenor is unfavorable to the party's cause*. Ever since the case of the Chimney-sweeper's Jewel [Armory v. Delamirie, 1 Strange 505 (1722)], this has been a recognized principle . . ."[36] ". . . the inference is clearly not a proper one where the person in question is one who by his position would likely be so *prejudiced* against the party that the latter could not expect to obtain from him the unbiased truth."[37] "It is commonly said that no inference is allowable where the person in question is *equally available* to both parties . . . Yet the more logical view is that the failure to produce is *open* to an inference *against both parties*, the particular strength of the inference against either depending on the circumstances. To prohibit the inference entirely is to reduce to an arbitrary rule of uniformity that which really depends on the varying significance of facts which cannot be so measured."[38] Mr. Wigmore commends[39] a dissenting opinion in the Alabama case of *Brock v. State*[40] which stated that a witness is not in truth "accessible" if, though present and compellable, he may be so hostile to the prosecution or *so connected with the defendant* that his testimony would be unavailable to the State. If the denial of the inference is based on the ground of the words "equally available" (emphasised by Mr. Wigmore), then certainly

---

[34]140 Miss. 597, 105 So. 747 (1925).
[35]98 Miss. 786, 54 So. 305, 34 L.R.A. (N.S.) 811 (1911).
[36]2 WIGMORE, EVIDENCE (3d ed. 1940) § 285.
[37]*Id.* § 287. Mr. Wigmore here cites Com. v. McCabe, 163 Mass. 98, 39 N.E. 777 (1895), to the effect that the failure of the defendant to produce persons present at the time of the seizure of illegal liquor was an allowable ground for the inference, their probable relation to the defendant being such as to make it useless for the prosecution to call them, when it has other evidence.
[38]*Id.* § 288.
[39]*Id.* § 288, n.4.
[40]123 Ala. 24, 26 So. 329 (1899).

under this construction a father and brother of the defendant would not be "equally available" to the prosecution as to the defendant.

If the adverse inference is not allowed where the witness is "equally available" to both sides, certainly the basis of this rule is that the failure to call has *no probative tendency* to prove guilt or innocence. It seems that in a state where "harmless errors" in a trial are so freely allowed, it is a peculiar rule which holds that a trial court will be reversed for allowing a prosecuting attorney to comment on a fact which has no probative tendency to prove guilt and which is so easily answered, when the witness is "equally available," by the replying comment that he could have been called by the opposite party. Would Mississippi hold that it was reversible error for the prosecuting attorney to comment on the fact that it was raining on the day a murder was committed, when the fact of such rain would have no probative tendency to prove guilt? Certainly it seems that a Court like ours, which still pays lip-service to the Mid-Victorian or Gay-Ninety rule that a party cannot (unless surprised and trapped) impeach his own witness, on the utterly ridiculous theory that the state or any other party calling a witness warrants him to be a person worthy of belief and trustworthy, should recognize the fact that witnesses are not "equally available" where by reason of relationship, bias, prejudice or other factors they are more likely to take the side of one party or the other. Such a rule prohibits the prosecution from making such a witness his own by calling him, just as effectively as if he were otherwise unavailable.

In *Imbraguglio v. State*[41] defendant was convicted of having rented a room to two girls knowing or with good reason to know that it was intended to be used for prostitution. The only evidence produced to show knowledge was the undisputed testimony that the girls were prostitutes. The opinion does not disclose any evidence that the defendant knew that they were prostitutes or that they were using his room for such purpose except that on one occasion he saw through an open door two soldiers in the room with the women when all four were fully dressed and engaged in no misbehaviour, after which time he advised the women that men could not visit them there. On another occasion military police raided the room and labored and brought forth the astoundingly incriminating evidence that one of the soldiers had his shirt collar unbuttoned contrary, believe it or not, to Army uniform regulations. No other incriminating evidence was added to this shocking disclosure. The women admitted that on two certain occasions they had

[41]196 Miss. 515, 18 So. (2d) 294 (1944).

engaged in acts of prostitution in the room but the opinion disclosed no evidence showing the defendant had knowledge thereof. Evidence was introduced that one of the soldiers who was in the room was two weeks later treated for venereal disease, but there was no proof that he had not visited other women nor does the opinion show that the defendant knew this. The opinion states that while this testimony was erroneously admitted, the majority would not reverse on that ground. It is submitted that where the acts of prostitution had been proven and, so far as the opinion shows, were uncontradicted, it would seem that this testimony would be highly useless, immaterial, and prejudicial in a case where the sole question was the knowledge of the defendant. Other testimony showed that the women had been detained by the health authorities for treatment for venereal disease in a city some forty or fifty miles from defendant's room and again with no knowledge to the defendant as to the reason for their detention; the opinion states that "some of the judges think that this testimony should not have been admitted" but the majority would not reverse on that ground nor did they think that a peremptory instruction should have been granted. It is again submitted that this latter testimony is certainly immaterial unless connected with the defendant by proof of knowledge, and is highly inflammatory. The majority chose not to designate the admission of this immaterial and inflammatory evidence as reversible error and also refused to reverse on the ground that there was no evidence to show knowledge on the part of the defendant but chose rather to pick out what the dissenting Chief Justice refers to as a "mere fly speck" of an error which was that one of the two instructions granted the state failed to include the expression "from the evidence" in its charge to the jury that they did not have to know the defendant to be guilty but that all that was required was that they must believe him to be guilty beyond a reasonable doubt. This was reversible error although the other instruction for the state advised the jury that "if it should believe from the evidence beyond a reasonable doubt" that the defendant committed the act with which he was charged they should find him guilty, and in spite of the fact, as pointed out in the dissenting opinion, that when empaneled the jury was sworn to give true verdicts "according to the evidence." The defendant was also given several instructions that it was their sworn duty to acquit until they were convinced "from the testimony beyond a reasonable doubt" that he was guilty. The dissenting opinion further points out that one of the Court's own former opinions in which it was held that this omission was reversible error, could not be used as an authority because the opinion in that case did not show enough facts to enable one to tell what the real ruling of

that case was. It is submitted that in view of the Court's prior rule that all instructions must be read together that the reversing error in the instant case is indeed, in the words of the Chief Justice, "a mere fly-speck." It is further submitted that as shown by the Chief Justice, an appellate court should be most careful in writing an opinion, to set forth all the facts and circumstances necessary to a determination of the questions appealed on, as otherwise in future years the value of an opinion as a precedent is worthless. An appellate court should ever keep in mind that the opinion which they write is not merely for the purpose of disposing of the case at hand, and that future generations who read that opinion for precedent and who were not present at the trial and argument, will not be as familiar with the facts and circumstances as was the trial or appellate court.

In *Richardson v. State,*[42] a prosecution for rape, the only evidence was the uncorroborated testimony of the prosecutrix and a confession. The testimony was described as being *"so highly improbable as to be scarcely believable,* except, of course, to one who would simply prefer to believe it," and that when the many unbelievable particulars "are considered together there arises such a doubt of the truth of what she has said on the stated crucial issue as to render the evidence *hardly equivalent to a preponderance* much less that which must carry conviction to an impartial and unbiased mind beyond all reasonable doubt." (Emphasis added) The Court then states that a majority of the Court are of the opinion in this respect that without the so-called confession of the defendant, he would be entitled to a peremptory charge. After consideration of the confession the Court states the testimony in this case was not sufficient beyond all reasonable doubt to sustain the verdict.

There is nothing in the reported case to indicate whether counsel made a motion for a new trial, or to set aside the verdict as contrary to the evidence, or on the ground that the evidence was insufficient to support the verdict, nor for a peremptory instruction, although the Court took judicial knowledge of the fact that defendant's counsel was both able and energetic, and indulged in considerable criticism of counsel for making only a *token defense.*

Assuming therefore, as to which the opinion is silent, that the proper motions were made, it is respectfully submitted that it would certainly be *error* for a trial court not to sustain a motion to set aside the verdict and grant a new trial when the evidence was so unbelievable as to be insufficient and would not warrant a jury in believing defendant to be

---

[42]196 Miss. 560, 17 So. (2d) 799 (1944).

guilty by a preponderance, much less beyond every reasonable doubt. One even wonders why the lower court should not have granted a peremptory instruction under such state of the evidence and also why the Appellate Court did not discharge there. Is it to be assumed that the state could have produced on the first trial, and will on the new trial produce, more and better evidence and that the prosecutrix will now tell a story "believable beyond every reasonable doubt" which will stand up in the face of a "strong substantial" rather than a mere token defense? Or will the Appellate Court again have to grant a new trial after a second conviction on the assumed unchanged testimony of the prosecutrix? If this was the only ruling of the Court it would not be subject to severe criticism, but in addition the opinion harks back in its own words to the "fifty year old" case of *Monroe v. State*[43] and to the more recent case of *Upton v. State*,[44] and states that in those cases it was held that a "conviction for rape may rest on the uncorroborated testimony of the person alleged to have been raped, but it should always be scrutinized with caution; and where there is much in the facts and circumstances in evidence to discredit her testimony *another jury should be permitted to pass thereon.*" (Emphasis added) To make bad matters worse the court reporter adopted this recitation of what had been said fifty years ago as the headnote of this case and with the exception of two other insignificant truisms there was no other headnote. It is submitted that it is an improper statement of the law to state that, where the prosecutrix in a rape case is uncorroborated, in every case where there is much evidence to discredit her testimony another jury should be permitted to pass upon it. In the headnote of the fifty year old *Monroe* case they added to the quoted headnote of the instant case a clause which says that where the facts and circumstances "fail to satisfy the mind as to the guilt of accused, but rather suggest grave doubts of it, a conviction should be set aside." Although the Court in the *Monroe* case nowhere used the language used in the headnote, the opening sentence in the opinion did state that *"no error was committed by the court* in the trial of the case but in our opinion the verdict should not be permitted to stand." It is again submitted that if the uncorroborated testimony after having been scrutinized with caution and the facts and circumstances in evidence do discredit her and do not warrant a jury in believing beyond a reasonable doubt the defendant guilty but rather cast grave and reasonable doubt on his guilt, then it is error for the trial court not to grant a peremptory instruction and certainly so to refuse a new trial. It would seem under the rule of the instant case that in every

[43]71 Miss. 196, 13 So. 884 (1893).
[44]192 Miss. 339, 6 So. (2d) 129 (1942).

case in Mississippi where the prosecutrix in a rape case is uncorroborated and where there is "much" to discredit her, the state is entitled to at least *two chances to convict the defendant* against whom the hardly believable evidence has raised such reasonable doubts. It would also seem that a Court who would reverse a trial court for a "fly-speck of an error" in its language in an instruction, should use more accurate language in assigning its ground for reversing a court which, according to it, has committed *no error*. The Court in this case also stated that "there hovers in the background of this record the broad issue of due process" because of the fact that defense counsel, an able and energetic attorney, made only a token defense. It would seem that if such was the fact the Court should have "unhovered" the background of this record by stating those errors as a caution to other members of the bar.

In *Cooper v. State*,[45] a homicide case where the defendant's wife had, according to the majority opinion, given clear and forcible evidence which if believed would establish the innocence of the defendant, the state proved a prior inconsistent statement made by the wife. On re-direct examination defendant offered testimony tending to explain away or state reasons why the inconsistent statement was made. The trial court sustained objections to this evidence. On appeal the majority opinion quite properly reversed on the ground that after proof of a prior inconsistent statement, the impeached witness is always entitled to explain away such contradiction. This ruling is practically universally followed. Wigmore states that "in accordance with the logical principle of relevancy, the impeached witness may always endeavor to explain away the effect of the supposed inconsistency by relating whatever circumstances would naturally remove it . . . To this end it is both logical and just that the explanatory circumstances, if any, should be received."[46] In the instant case the defendant's wife made a prior statement that she killed deceased and then changed to an inconsistent statement showing justifiable homicide by her husband. In explanation she stated that her husband had high blood pressure and a bad heart and she was afraid that his *arrest and trial* for the crime would endanger his health. Wigmore states that whether additional testimony may be introduced as to the *correctness of the explanation* given by the witness is doubtful as a matter of precedent, but that convenience would seem usually to require its exclusion.[47] This raises an interesting question as to whether the state would have been allowed to prove that her husband had never had high blood pressure

[45]196 Miss. 566, 18 So. (2d) 453 (1944).
[46]3 WIGMORE, EVIDENCE (3d ed. 1940) § 1044. Numerous cases are cited in accord.
[47]*Id.* § 1046.

or heart trouble. However, as stated, the ruling in the instant case is eminently correct unless as stated in the dissenting opinion by the Chief Justice it was "hardly within the realm of probability that had the evidence here excluded been admitted, the jury would have been even remotely influenced thereby in the rendition of its verdict." It is impossible to evaluate that statement in view of the fact that neither the majority opinion nor the dissenting opinion states the facts, except that in the majority opinion it is stated that according to the testimony of some, Cooper was guilty and according to the testimony of others it was justifiable homicide, and that had the wife's clear and forceable testimony been believed it would have established defendant's innocence. To harmonize these apparently conflicting statements it is necessary to reduce the Chief Justice's words to a mere statement that the jury would not have believed the wife—a question sometimes left to the jury.

In *Leflore v. State*[48] the defendant was indicted for murder and convicted of manslaughter. During the trial the district attorney made a motion for a view of the place at which the offense was charged to have been committed and requested such view only in the words of the statute "in order to reach the ends of justice." No reasons were assigned as to why the view was necessary. The statute states "When, *in the opinion of the court . . . it is proper,* in order to reach the ends of justice, for the court and jury to have a view . . . of the place at which the offense is charged to have been committed . . . the court may, *at its discretion,* enter an order providing for such view . . ."[49] (Emphasis added) The Court in the instant case ignored the objection that no formal order granting the view was entered on the minutes but reversed and remanded on the ground that the motion should have set out the grounds necessitating such view, with opportunity for the defendant to controvert and disprove the asserted grounds. It will be noted that the legislature clothed the trial court with the necessary discretionary power to grant a view if in its *opinion* it was proper in order to reach the ends of justice. The exercise of a discretionary power is seldom grounds for a reversal unless the discretion is abused. It is well to note that the legislature never restricted the trial court in the exercise of this discretionary power to cases where the trial court felt that it was *necessary* to reach the ends of justice, but only to those cases where in its discretion and in its opinion it was *proper* to reach the ends of justice. In this case and in the case of *Great A. & P. Company v. Davis,*[50] on which the instant

[48]196 Miss. 632, 18 So. (2d) 132 (1944).
[49]Miss. Code Ann. (1942) § 1800.
[50]177 Miss. 562, 171 So. 550 (1937).

case relied, the Supreme Court has not only limited the trial court's discretionary power to cases where such action is *necessary* to reach the ends of justice but also requires that the moving party must set forth these reasons in his motion and give the opposing party an opportunity to disprove or controvert such necessity. It was, of course, necessary in a jurisdiction which so freely allows "harmless error" that the appellate court should show the harm done to the defendant. This they did in *Great A. & P. Co. v. Davis* by stating that the allowance of a "view" by the jury practically deprives the judge and the appellate court of the power of reviewing the case on an assignment that the verdict is contrary to the overwhelming weight of the evidence, and that therefore a view is "allowable only when the alleged necessity therefor in order to reach the ends of justice bears some fair relation by way of equivalency, in that interest, to the right which otherwise would be unhampered and unimpaired to have the verdict reviewed on the *record* evidence."

It is interesting to note that in the instant case the Court stated that the acts occurred in July and the trial in September, and that the forces of nature and man had been busy in the meantime and from the view the court and jury gained practically nothing except "the appearances of nature in September." If that be true it is difficult to see why a mere "nature study in September" could in any way harm the defendant or destroy his constitutional right to have his case reviewed on the record evidence. It is even conceivable that such a nature study or view of nature might not be *necessary* or *even proper* but it is difficult to see why the taxpayers should be put to the expense of a new trial simply because the trial court and jury enjoyed a "September morn nature study," if no harm was shown, no constitutional rights destroyed, and nothing occurred except a trial court's harmless mistake in the exercise of a discretionary power. It is interesting to note that defendant's second trial also resulted in conviction for manslaughter with evidence which the Supreme Court in a masterpiece of understatement characterized as "strange happenings and events."[51]

In *United States Gypsum Co. v. Reynolds*[52] the question was whether a movement of about a mile of the Mississippi River between the years 1829 and 1858 was by gradual erosion and accretion or by avulsion. The plaintiff introduced certain evidence as to the lay of the land, the length of the elapsed time as related to the distance of the movement and the general correspondence of the location and direction of the river. Experts had also given their opinions based on the foregoing circumstances

[51]Leflore v. State, 197 Miss. 337, 22 So. (2d) 368 (1945).
[52]196 Miss. 644, 18 So. (2d) 448 (1944).

that the process was by accretion. There was no countervailing evidence. The trial court sustained a motion to exclude the plaintiff's evidence and on appeal the case was reversed, the Court stating that "a presumption exists founded on long experience and observation that a movement such as happened here was by gradual erosion and accretion." The Court further stated that in the absence of countervailing evidence the presumption prevails when from the evidence as introduced "the stated presumption may be reasonably entertained." The Court without citing authority stated that this was the weight of authority, both state and federal. It is submitted that this is an improper use of the term presumption and that more accurately what the Court meant and held was that the evidence adduced, including the circumstances as outlined and the opinion of the experts, warranted an inference by the jury that the action was by accretion especially in the absence of countervailing evidence.

In *Tanner v. State*[53] the defendant on trial for robbery offered evidence that he had been acquitted of assault and battery with intent to kill and murder and that the indictment for robbery was based on the same evidence as was the indictment in the assault case. The court excluded this evidence. It is difficult from the reading of the briefs and the opinion of the Supreme Court to understand what the objection was. The Court in affirming said that the evidence of "former acquittal" was properly excluded because of the fact that where the defense is "former acquittal" it must be pleaded by the defendant before evidence thereof will be admitted and that this is an exception to the general rule that the defendant under the plea of not guilty can make any defense he has. The defendant admitted in his brief that by offering this evidence he was not making a defense of "former acquittal" when he stated that the defendant "could not have filed a plea of former acquittal for the reason that he had not been tried on a charge of robbery, but he had been tried and acquitted of one of the essential elements of the crime of robbery and that justice required that under a plea of not guilty that he be permitted to establish such." It would seem that what the defendant was doing and what he meant by being "permitted to establish such" was that he be permitted to show to *this* jury that *another* jury had disbelieved the evidence of an essential element of the crime of robbery. It is submitted that of course the proper answer to this should have been that the *opinion* of the former jurors was not admissible, and that furthermore their opinion that he had no intent to murder did not necessarily indicate their opinion as to his intent to rob.

---

[53]196 Miss. 822, 18 So. (2d) 300 (1944).

In *Martin v. State,*[54] a prosecution for conspiracy to obtain property by false pretenses, the false pretense consisted of having falsely advised the prosecuting witnesses that certain oil royalty acreage which accused offered to exchange for certain property of the prosecuting witnesses was selling for not less than $100 per acre in the vicinity of the leases and that the market was very active in that vicinity. On the trial, evidence was admitted of dealings between the defendant and the prosecuting witnesses with reference to oil royalty acreage in other places than the one involved in this trial and that the prosecuting witness had not received any revenue from the oil acreage purchase. The Appellate Court ruled this evidence incompetent as having no bearing on the conspiracy charge. Certainly in a case of conspiracy to obtain money under false pretenses the intent or design to defraud and the knowledge of the falsity of the statement are material issues. It is submitted that generally the rule is accepted that where elements of knowledge, intent and design are involved, evidence of similar offenses or other acts offered for the purpose of showing such a knowledge, intent or design are admissible.[55]

In the instant case the prosecuting witnesses "testified from typewritten notes" as to what occurred between them and the alleged conspirators, made by them a day or two before the trial and about a year and a half after the occurrence of the events." The majority of the Court, treating this as a memorandum to refresh recollection, stated that one indispensible requirement for the use of such a memorandum is that it must have been made contemporaneously with the transaction, and the dissenting opinion bases its dissent on the refusal to adopt "a universal rule excluding those not made contemporaneously with the event." The dissenting opinion also treated the memorandum as one to refresh recollection. It is respectfully submitted that this language confuses two distinct devices: (1) a memorandum (not offered in evidence) used to refresh recollection, and (2) a memorandum offered and received in evidence as past recollection presently recorded. If the memorandum is offered in evidence as past recollection presently recorded and concerning the contents of which the witness has no present recollection, there *is* a requirement that the memorandum must have been made at or about the time of the transaction recorded. On the other hand, however, when *any* object, paper, memorandum, or other thing is used merely to refresh recollection there is no requirement that the object, paper, memorandum, or thing must have been made contemporaneously with the transaction recorded or even that it be a re-

[54]197 Miss. 96, 19 So. (2d) 488 (1944).
[55]*See* 2 WIGMORE, EVIDENCE (3d ed. 1940) § 300 *et seq.*

cording of the transaction. The test is simply whether the memorandum, object, paper, noise, or other thing brings back to the witness' present recollection a memory of the transaction as to which testimony is given.

In *Grimes v. Grimes*[56] the Court stated that where the rule excluding witnesses had been invoked, but the defendant remained in the courtroom until after several of her witnesses had testified, this did not justify the court's refusal to permit her to testify. The Court cited *Wilson v. Peacock*,[57] where it was stated that this prohibition was a mere rule of practice and that before a party could be kept from testifying "he must be given the alternative of testifying first or leaving the courtroom." No procedure is indicated but it is surmised that this means that it is the duty of the opposing party before taking advantage of the rule to request the trial judge to present the alternative.

In *McCaslin v. Willis et ux*[58] the plaintiffs, Willis and his wife, executed a promissory note secured by deed of trust on land to one McCaslin who died prior to the maturity of the note. In some way the note and deed of trust either never left or later came into the possession of Willis and his wife. Plaintiffs filed a bill in chancery to cancel the note and deed of trust as a cloud upon their title. The obstacle of the statute[59] prohibiting a person from testifying to establish his own claim or defense against the estate of a deceased person, was overcome by having their attorney introduce the note and deed of trust in evidence and to testify that he had received the same from his clients prior to maturity. They then invoked the negotiable instruments law, providing that "a negotiable instrument is discharged when the principal debtor becomes the holder of the instrument *at or after maturity* in his own right."[60] Then plaintiffs rested their case. The answer of the defendant had denied that the note had been paid and denied the plaintiff's rightful possession of the note and deed of trust. A motion to exclude plaintiff's evidence and for a peremptory instruction was overruled. The defendant thereupon undertook to call alternately Willis and his wife, but was met with an objection by each that the other could not testify against his spouse under the statute making the husband and wife incompetent witnesses where either is a party without the consent of both.[61] The defendant then called McCaslin's attorney, who was also the trustee under the deed and the attorney for the estate, who offered to prove that the deceased

---

[56]197 Miss. 315, 20 So. (2d) 662 (1945).
[57]111 Miss. 16, 71 So. 296 (1916).
[58]197 Miss. 366, 19 So. (2d) 751 (1944).
[59]Miss. Code Ann. (1942) § 1690.
[60]*Id.* § 160(5).
[61]*Id.* § 1689.

had made to him prior statements consistent with the position of the estate that the note had not been paid. This testimony, instead of being objected to as hearsay under the rule that prior consistent statements are not admissible to establish the position taken on the trial, was, peculiarly enough, objected to on the ground that it was a privileged communication between a client and his attorney and therefore inadmissible and could not be waived by the legal representative nor heir. The Supreme Court in discussing the privileged communication angle stated that they had previously held that the communication of a patient to his physician could not be waived except at the instance of the patient and stated that while Mississippi had a statute creating a physician-patient privilege and limiting waiver to the patient,[62] we had no such privileged communication statute as to attorney and client. The answer to this thought is of course obviously that the attorney-client privilege was so thoroughly well embedded as a principle of common law that we didn't need a statute in Mississippi, while there was no physician-patient privilege at common law; and while there is no express statute which provides that a disclosure can not be made except with the consent of the client as is true in the case of the patient, nevertheless the attorney-client privilege has historically and forever been a privilege of the client. The Appellate Court, without expressly deciding who could waive the privilege, swept away the objection of the attorney-client privilege with an "at any rate" statement that even though the witness was repeating a statement made by his client, he was nevertheless competent to testify *to refute the contention when made* that the deceased had made an alleged statement against interest that the debt had been paid. However, the facts of the case show that this statement by the attorney was not to refute any prior admitted statement against interest made by the deceased, but on the contrary at the time no such prior statement against interest had been introduced. The Court clearly stated that this testimony of the attorney was offered *in advance* of that regarding the statement of the deceased against interest. Subsequently, in rebuttal a witness was offered by the plaintiffs who testified that the deceased had told him two months prior to his death that Mr. Willis had paid off the debt in full. This was an admission, a so-called exception to the hearsay rule and clearly admissible as such.

It will be remembered that the estate of the deceased was the defendant in this action and that the testimony of the attorney that the deceased had told him that the note was not paid *was not offered at a time*

---

[62] *Id.* § 1697. But note the change in this statute made by Miss. Laws 1944, c. 315.

when it could be said that it was *in rebuttal* of a claim of recent fabrication because the prior inconsistent statement subsequently introduced by the plaintiff had not at that time been introduced. So the holding of this case must necessarily be that *in order to show that a note has not been paid* an attorney in spite of his relationship may repeat what his client had told him as a prior statement consistent with the position of nonpayment, where *it was "necessary" to do so to meet the* ends of justice and where the *only other witnesses were unavailable;* the declarant being unavailable because of death and the makers of the note being unavailable because of the husband and wife privilege. In the instant case, the Court said "statements made by a person since deceased are admissible under an exception (to the hearsay rule) based on the ground of necessity." And further the Court stated that "the complainants *having claimed their legal exemption* [husband and wife privilege] . . . it would seem that the ends of justice would require the allowance of the exception in so far as the hearsay evidence rule is concerned, since the decedent is no longer able to deny he made it, and the ends of justice may demand that the exception be allowed to be met in rebuttal by a counter-exception that he made declarations to the contrary of those alleged to have been made against his interest." Here then our Court has "withdrawn the right of cross-examination" so as to allow a witness to repeat what he has been told, where the declarant was not under oath, and there was not the usual guaranty of trustworthiness to be found in the fact that the statement was against the interest of the declarant, but on the contrary was self-serving and in favor of his interest. It is submitted that under the fetish of the historically developed hearsay rule it is only statements *against the interest* of the declarant or of a party which are admissible to prove the truth of the content of those statements, either as a declaration against interest in the case of a non-party, or as an admission of a party-witness. Prior inconsistent statements of a non-party witness are admissible not to prove their truth but only to impeach credibility, while prior consistent statements of either a non-party or a party witness are never admissible under any circumstances *except to rebut an attack upon the credibility of a witness* by a claim of recent fabrication, and then only for the purpose of bolstering the credibility and never for the purpose of proving the truth of the content of the statement. And of course an admission by a party-witness or his predecessor in title is not offered as an attack upon credibility but as direct evidence of the truth of the content of the admission.

It is submitted that the Mississippi Supreme Court has in words at least, whether intentionally or unintentionally, swept away this fetish and

in this case allowed an attorney to repeat what his client has told him, even though what the client had stated was a prior self-serving statement consistent with the position his successors in title took on the trial, and for the purpose of proving the truth of the content of that statement. This they did in a case where it was necessary to do so to meet the ends of justice and where the declarant and all other witnesses who could give direct non-hearsay testimony were unavailable by reason of death and the husband and wife privilege. It is submitted that this holding to all practical intents adopts the intelligent principle of rule 503 of the American Law Institute Model Code of Evidence, which provides "that evidence of a hearsay declaration is permissible if the judge finds that the declarant is unavailable as a witness or is present and subject to cross-examination."

Considerable opposition to such a rule may be found among the bench and bar of this state on the ground that all a party has to do in order to make hearsay evidence admissible is to have the declarant absent himself. On the other hand, we should realize that rules of evidence cannot be formed which will prevent perjury and subordination of perjury, and that of course before a witness can repeat what the absent declarant has said it must be shown that the declarant was in fact a witness, and that it is just as easy, if a party is going to manufacture testimony, to manufacture a witness who will lie directly, and say that he saw the maker of the note pay same, as it is to manufacture a declarant who was present at the manufactured payment, and then manufacture a witness who will take the stand and swear that the declarant told him that the note was paid. And it is far easier to obtain a perjuring witness to testify directly to a lie than it is to get the declarant to die or move out of the state or to marry or otherwise become unavailable.

It is also interesting to note in the instant case that a Court which will reverse because an *attorney* comments on the fact that a husband or wife claimed their privilege against testifying against each other, will nevertheless, when such husband and wife get into the Supreme Court, penalize those spouses by using the fact that they have claimed their privilege, as one of the reasons why that Court will recognize an exception to the hearsay rule by way of necessity to meet the ends of justice.

In *Newsome v. State*[63] defendant in a murder case pleaded self-defense. He offered to prove that the deceased had told defendant that deceased had killed three men. This was excluded. On appeal the case was affirmed, the Court stating that the desperate and dangerous charac-

[63]197 Miss. 797, 20 So. (2d) 708 (1945).

ter of the deceased when otherwise competent cannot be proven by antecedent acts of violence committed by him although the defendant has knowledge of them. If we exclude this evidence solely on the ground stated by the Court we again adopt rule 503, Model Code of Evidence, because here of course was no offer to prove any antecedent acts of violence, unless we admit that a mere hearsay statement made by deceased to defendant is admissible to prove the truth of the content of the statement. If we do as the Court did and pass up the objection that this was hearsay and admit that the deceased declarant's hearsay statement is good evidence that the declarant had killed three men but that it is inadmissible solely because dangerous character of the deceased although known to defendant cannot be shown by antecedent acts of violence, we are met by Wigmore's statements that "when the issue of self-defense is made in a trial for homicide and thus a controversy arises *whether the deceased was the aggressor,* one's persuasion will be more or less affected by the character of the deceased: it may throw much light on the probabilities of the deceased's action";[64] and that "when the turbulent character of the deceased, in a prosecution for homicide, is relevant, there is no substantial reason against evidencing the character by *particular instances* of violent or quarrelsome *conduct.* Such instances may be very significant; their number can be controlled by the trial Court's discretion; and the prohibitory considerations applicable to an accused's character have here little or no force."[65] The Mississippi Court is cited as holding contrary to both these statements and, in commenting on *Richardson v. State,*[66] Mr. Wigmore states: "deceased's *peaceful* character, excluded, though defendant had testified to an act of aggression by deceased; this case in its circumstances again exhibits the shockingly unfair nature of this rule; why do Courts feel themselves bound by the shackles of a senseless chain which they themselves locked and can unlock?"[67] Mr. Wigmore further states that such evidence should be admissible even though the defendant had no knowledge thereof, and that it was *only* on the issue of the defendant's *state of mind and apprehension* that knowledge of either threats or violent acts or bad character becomes material and not when the issue is as to who was the aggressor.

In *New Orleans & N. E. R. Co. v. Miles*[68] the Court uses this language: "The record and briefs have been fully examined by two judges

---

[64] 1 WIGMORE, EVIDENCE (3d ed. 1940) § 63.
[65] *Id.* § 198.
[66] 123 Miss. 232, 85 So. 186 (1920).
[67] 1 WIGMORE, EVIDENCE (3d ed. 1940) § 63, n.2.
[68] 197 Miss. 846, 20 So. (2d) 657 (1945).

and fully reported at not less than two conferences as required by our usual procedure, and as a result *not one of us can say that he believes it reasonably probable that the initial injury occurred in or on the avenue crossing . . .*" (Emphasis added) This was the question at issue in the case. In *Lavecchia v. Mayor et al. of Vicksburg*[69] the Court states: "It is earnestly urged by appellant that this case should also be reversed and remanded because the verdict of the jury is against the overwhelming weight of the evidence. The Court is *divided* on that, which means an affirmance on that question standing alone." It is submitted that one who was not familiar with our Court might wonder from reading those statements whether the Court was not somewhat inclined to trespass upon the function of the jury. Ordinarily the test for setting aside a verdict of the jury is: Does the evidence have sufficient weight that reasonable jurors are warranted in reaching the verdict they did? It is submitted that if all six reasonable Supreme Court Justices cannot agree that the verdict is against the weight of the evidence that fact alone should be *some indication* that the question is one for the jury. Also in the *New Orleans & N. E. R. Co. v. Miles* case the Court states that "the right of cross-examination is one of the most valuable, not only to an opposite party but to the general administration of justice, which our procedure affords, and *only the public necessity* mentioned by our Court *has ever in this jurisdiction been considered as sufficient to justify the withdrawal of that right.*" (Emphasis added) In using that language the Court was confirming the great weight of authority in refusing to extend the admissibility of dying declarations to civil actions, but the statement hardly jibes with the rule announced in *McCaslin v. Willis, supra,* where the right of cross-examination was "withdrawn," not for *public necessity* but to meet the ends of justice in a civil action where the declarant was dead and other direct testimony was unavailable. It is further submitted that the right of cross-examination is "withdrawn" in *every* case in Mississippi and elsewhere whenever evidence is admitted as a so-called exception to the hearsay rule: such as confessions, admissions, declarations against interest, pedigree, business entries, former reported testimony, res gestae and all the others in tail.

In *Pace v. Wedgeworth,*[70] A. B. Wedgeworth owned certain land on which he had executed a deed of trust to one Cooper to secure a debt of $2500. Cooper later assigned the debt and deed of trust to the city of Laurel, proper marginal notation being made thereof on the record. Later Wedgeworth conveyed the land to the city of Laurel and through

[69]197 Miss. 860, 20 So. (2d) 831 (1945).
[70]198 Miss. 1, 20 So. (2d) 842 (1945).

mesne conveyances thereunder this title was later acquired by Mrs. Ethel Wedgeworth, the intervenor. While the title was still in A. B. Wedgeworth and while the city of Laurel still held the deed of trust on the land, the property was sold to the state for taxes and the time for maturing of this tax title expired while the title was still in A. B. Wedgeworth and the deed of trust was still held by the city of Laurel. After the tax title matured the state issued a tax patent to plaintiff who brought this suit to confirm and quiet title in himself as patentee from the state with process served on the attorney general as provided by law. Mrs. Ethel Wedgeworth intervened. A statute[71] provides that it is the duty of the chancery clerk to examine the records of deeds of trust in his office to ascertain the names and addresses of all the lien holders of land sold for taxes and within 90 days and not less than 60 days prior to expiration of the time for redemption to send by registered mail to all such lienors, so found, a notice that the title would become absolute in the purchasers unless redeemed before a specified date.

The statute further provides that after such examination the clerk shall enter upon the tax sale book a notation to the effect: (1) that he has made the examination, (2) giving the names and addresses of the lienors, (3) the book and page of the record, and (4) the *date* of mailing by registered mail the notice to the lienors.[72] In a separate section which fixes the fees of the clerk for performance of his duties it is provided that "a failure to *give the required notice* to such lienors, shall render the tax title void as to such lienors, and as to them only . . ."[73] (Emphasis added) There is no provision in the statute which states that a failure of the clerk to enter the notation after giving notice and after completion of examination shall render the sale void. In the intervening petition it is claimed that the tax sale was void as to the city of Laurel because the chancery clerk *failed to send a notice by registered mail* to the city of Laurel "of the fact of said sale on the notice of the expiration of the time of redemption . . . and none was received by said city of Laurel." It will be noticed that so far as the official report shows the intervening party did not even claim that the failure of the clerk *to make the notation* of having sent the notice would avoid the sale and the lower court's decree finding that the said tax sale was void did not find that the notice was not sent nor did it find that the notice was not received but simply declared that the sale was void because "there was *not made any record showing that notice had been sent* to the said lienor by registered mail."

---

[71]Miss. Code Ann. (1942) §§ 9943-9946.
[72]*Id.* § 9945.
[73]*Id.* § 9946.

The plaintiff, purchaser under the tax sale, had made the claim that the city of Laurel had no right to accept the assignment of the debt and deed of trust, but the Court, acting on the presumption that public officers have done their duty,[74] stated that "we must presume the municipality through its officers brought itself within the authorization of the statute." It is submitted that it should also be presumed that the chancery clerk, another public officer, did send a notice by registered mail, all as required by law, in the absence of evidence to the contrary. The appellate court in the instant case affirmed the decision of the lower court. There is no statement in the report to indicate that any evidence was introduced to show that the chancery clerk did not in fact send the notice, or that the city of Laurel did not receive it. On the contrary there were introduced the pertinent tax records which showed conclusively that the clerk did not make the *proper* notation on the tax record as required by the statute, but on this tax record (presumably opposite the record of this tax sale) and under a heading marked "Notices mailed by registered mail" there appears the date "August 19, 1936." The Court in affirming stated that "*since* the chancery clerk's *notation on the record did not show notice sent by registered mail* as required to be shown by the statute, the tax sale was void as to the city of Laurel." (Emphasis added)

It will be noticed that this is not a ruling that the tax sale is void because there was no evidence that the notice was mailed but on the contrary is a ruling that the sale was void because the clerk failed in his duty to make the memorandum. It is true that the Court proceeded to state that although the entry (August 19, 1936) does say that notice was sent by registered mail on that day, nevertheless "the only entry permitted by the statute to have effect, and to have probative value must be a certificate dated and signed by the clerk in accordance with the prescribed procedure set out in the statute." It is submitted that this is perfectly true and that this mere date entry would not be admissible evidence to prove that the notice was sent, and if that were all that the Court held there could be very little criticism. But the Court not only excluded this notation but proceeded to exclude all other evidence, and stated that the *purpose of the legislature in requiring this certificate* by the clerk *was* "to prevent mere writing on the record page from having evidentiary value, and to furnish a check and support of the authority of

[74]On this point see W. T. Rawleigh Co., Inc. v. Causey, Sheriff, 195 Miss. 842, 16 So. (2d) 397 (1944), in which a double-edged use of this presumption was made. In a suit against a sheriff for failure to make proper return of a writ, it was held that the presumption that the outgoing sheriff had delivered the writ properly to the incoming sheriff was met and neutralized by another presumption that had the outgoing sheriff done so, it would be presumed that the incoming sheriff had done his duty.

the entry and its official nature as the act of the clerk, so that it would have dependable probative value; and *to avoid evidence becoming unavailable* because of the death or removal of witnesses, or the impairment of its value through treachery of the human memory due to the lapse of time." (Emphasis added) In other words the Court has stated that to assure that the state would not lose title to lands purchased at tax sales *for lack of evidence, a safeguard is required,* in that it is made the duty of the clerk to make a record which shall be admissible in evidence as proof of the procedural steps taken in the sale and not leave this to the memory of witnesses who may die or forget. And now after the legislature has decreed that this additional safeguard shall be taken, the Supreme Court has placed the State of Mississippi in a worse position than they would have been had not the safeguard been taken. Certainly before this "safeguard" was set up, other evidence would be admissible that the notice was mailed, but as this case is a ruling that the *failure to make the evidence* shall render the sale void and the title of the state bad, then regardless of whether the notice had been given or not, evidence that the notice had been given would be immaterial. The Court in the instant case proceeded to state that "this evidence cannot rest in parole and cannot be produced except by the certificate in the manner and form required by the statute . . . and the sale, therefore, was void."

It is submitted that the statute sets up four things for the clerk to do in case of a sale, to wit: (1) examine the mortgage record, (2) ascertain the names and addresses of the lienors, (3) send the notice of the sale by registered mail to the lienors, (4) enter upon the tax sale book a notation showing (a) the fact of the examination, (b) the names and addresses of the lienors, (c) the record book and page of the lien, (d) the *date* of mailing by registered mail the notice. It is true also that the statute provides *only* that *the failure to give the notice* shall render the sale void, and it is submitted that if the policy of the legislature had been that the failure to perform all of these enumerated duties would avoid the sale, then they would have not singled out merely one of these duties as a reason for avoiding it. The Supreme Court by this decision has amended section 9946 so as to read "and a failure to give the required notice to such lienors *or to perform any of the other duties set forth herein* shall render the tax title void as to such lienors." It is submitted that if there had been no entry at all made by the clerk, the Court in the absence of legislative prohibition to the contrary should have allowed parole or written evidence to show that the notice was given, and even in the absence of that, should have indulged in the presumption that a chancery clerk is a public official and in the absence of evidence to the

contrary that he has performed his duty in sending the notice, if the Court is going to apply the same presumption to this chancery clerk that they did to the municipal officers of Laurel and to a couple of sheriffs in the case of *W. T. Rawleigh Co. v. Causey.*[75]

It is recognized that there has long been a policy in this and other states to keep land on the tax rolls for revenue producing purposes and that therefore tax titles are looked at askance, but it should be borne in mind on the other hand that tax sales are themselves for revenue producing purposes and that, after all, there should be *some policy* in this state that people should pay their real estate taxes.[76] The policy of destroying tax titles was carried to its extreme in the case of *Lamar Life Insurance Co. v. Mente and Co.*,[77] on which the instant case relied. The facts were almost identical except that the notation made by the clerk read as follows: "Examination by me made as to lienors of land herein sold, and *notice required by law mailed* to Lamar Life Insurance Co., and L. B. Jones, Trustee, Jackson, Miss., lienors as per d/t recorded Book 77, page 283. This the 10 day of July, 1934, Eustis McManus, Clerk." (Emphasis added) In that case the Court held that because that notation used the phrase "notice required by law" instead of "notice by registered mail," the sale was void, and this in the face of the fact that there is no provision in the statute which states that the notation shall show that the "notice was sent by registered mail," but merely that it shall show the "date" of mailing by registered mail. The Court in that case continued: "the statute expressly provides what the clerk shall do and what the evidence thereof shall be. . . . *The fact* that the *notice was forwarded by registered mail is not permitted by the statute to rest in parole,* but must appear on the notation thereof by the chancery clerk on the record, and unless this notation is made, *the fact,* in legal contemplation, does not exist. *Ita lex scripta est.*" (Emphasis added) Clearly by this it is held that the fact that the notice was forwarded by registered mail does not in legal contemplation exist unless proper notation is made. It is submitted that the parole evidence rule certainly does not exclude outside proof that the notice was mailed by registered mail; the statute certainly did not exclude it, when the purpose of the statute as stated by the court is to perpetuate evidence and not to destroy its use; and certainly no one but the legislature should exclude parole evidence unless an exclusionary rule existed at common law. *Ita lex scribenda est. Quaere:* Suppose the "money-bags" deed of trust holder should

[75]195 Miss. 842, 16 So. (2d) 397 (1944). See note 74 *supra.*

[76]On the subject of tax titles generally, *see* Clark, *Tax Titles in Mississippi* (1946) 17 Miss. L. J. 372.

[77]181 Miss. 479, 178 So. 89 (1938).

admit that he received the notice or suppose that the post office department had returned a receipt card for the registered letter?

In *Renfroe v. Aswell*,[78] Aswell executed a bill of sale to Renfroe for a half interest in a sawmill of which they had been joint owners. Renfroe in return executed a promissory note to pay the purchase price. In a suit on the note, in defense, evidence was offered of an oral agreement made prior to the note and bill of sale that the sawmill was to be placed in Renfroe's name for the purpose of obtaining a loan from a federal agency, in which case the note would be canceled. On appeal it was held that this evidence was properly excluded on the ground that it contradicted the written note and bill of sale. It is everywhere recognized that the parole evidence rule is not really a rule of evidence but rather of substantive law, based on the theory of integration, which is that only those terms of a contract which the parties could be reasonably expected to have integrated into the document, as a part of their contract, are excluded by the parole evidence rule. In other words if two parties enter into a negotiation looking to a contract and later reduce their entire agreement to writing, there is an implied term of every such writing that says, "we have agreed that this instrument shall be the sole evidence of our agreement." It is only when one can read this implied term into the instrument that the parole evidence rule applies; in other words, only when the parties have agreed to completely integrate into the instrument the entire agreement. The rule has no application to those instruments which represent only a part of their agreement. There are some instruments which by law are prohibited to contain the entire agreement between the parties. The penalty of such inclusion being that the instrument will lose the character desired by the parties. In this class are negotiable instruments, which by rule of substantive law are declared non-negotiable if they contain terms and conditions limiting the duty to pay. Certainly therefore the parole evidence offered in this case, which went to prove that the note was never intended as a binding obligation but was used, along with the bill of sale, as a device to place the apparent title in the name of one of the partners so that they might obtain a loan from a federal agency, could not be expected to have been integrated into a condition which said: "This note is not to be paid on condition we get a loan from the agency." Why it was more likely that the loan would be obtained if the title was in the name of one of the partners is not shown but obvious reasons could exist.

---

[78]198 Miss. 159, 21 So. (2d) 812 (1945).

The bill of sale under this evidence should not be considered a complete integration of their agreement. Certainly no one could presume that if it was desirable, in order to obtain a loan from a federal agency, that the title should appear to be solely in the particular partner, that the partners by any stretch of the imagination would have integrated and written out into that bill of sale a statement which advised all federal agencies that the title really was not in that particular partner but that pursuant to an agreement, the equitable title remained in the two of them, just as it did before the execution of the bill of sale, and therefore this is no bill of sale at all. Until we can find an intention on the part of the parties to a written instrument to integrate the subject matter of offered parole evidence into the written instrument the parole evidence rule has no application and it is respectfully submitted that this evidence should have been allowed.[79]

IV.

INSURANCE

*O. B. Triplett, Jr.**

A. Nature of the Contract

The insurance policy is a contract of "adhesion," to the terms of which, as fixed by the insurer, the insured must "adhere" if he chooses to purchase, and the effort of the courts is to give effect to the fair intent of the parties, taken as a whole.

Where the policy contains a rider, our court in *Camden Fire Insurance Co. v. New Buena Vista Hotel Co.*[1] held that it controls the policy in so far as it enlarges, modifies or restricts the terms thereof.

And, because of the peculiar nature of the contract, the rule was reaffirmed in *White v. Standard Life Insurance Co.*[2] that a mere collecting agent has no authority to modify its terms and that it may be continued in force by premium payments although coverage is temporarily suspended by act of the insured.

---

[79] *See* 9 Wigmore, Evidence (3d ed. 1940) § 2430 *et seq.*

*Member Mississippi and Scott County Bars; Forest, Mississippi.

[1] 24 So. (2d) 456 (Miss. 1946).

[2] 22 So. (2d) 353 (Miss. 1945).

B. Construction of the Life Policy

(1) Insurable Interest

In solving the legal relations flowing from the insurance contract the function of the courts is to keep the doctrines up to date with the *mores* of their day by continual restatement and by giving them a continually new content.

However, in *Frank v. Frank,*[3] it is doubtful if this function was attained. Ollie Lee married Dan Evans in 1912. Dan left shortly thereafter; and, until after 1935, neither Ollie Lee nor Dan's relatives could hear from him, although diligent effort was made to do so. Ollie Lee, in 1935, married Isom Frank, who, as a member of a fraternal association, was issued a policy in which Ollie Lee was beneficiary, but which, by the society by-laws, was limited to persons related by blood or by marriage. Isom died; and, Dan having been discovered alive, Ollie Lee's rights as a beneficiary were contested by relatives of Isom, who contended that they were his heirs. A divided court reversed the lower court and held that Ollie Lee's second marriage was void.

The welfare of society, particularly in our Southland, demands that the statutory presumption of death after seven years of unexplained absence and the contract of a second marriage ought to create the conclusive presumption of a divorce from the first marriage. For the final cause of law is the welfare of society; and any rule that misses its aim cannot justify its existence. The sound principle of *Harper v. Fears*[4] and *Ladner v. Pigford*[5] is severely restricted in *Frank v. Frank,* if not overruled.

Furthermore, where not expressly precluded by statute or the charter of the association, it is difficult to discover a sound basis on which the insured in a fraternal association should be precluded from designating a beneficiary outside of a class fixed by the by-laws; whereas, the insured in an "old line" policy may make the proceeds of his own policy, contracted for by him, payable to anyone whom he may select.

For example, in *Van Zandt v. Morris*[6] the policy provided that "no person shall be designated as beneficiary in this policy unless such person shall have a beneficial interest in the life of the insured." Yet the court gave proper recognition to the rule that every man has an insurable interest in his own life; that while a beneficiary without interest

---

[3]193 Miss. 605, 10 So. (2d) 839 (1942).
[4]168 Miss. 505, 151 So. 745, 93 A.L.R. 341 (1934).
[5]138 Miss. 461, 103 So. 218 (1925).
[6]196 Miss. 374, 17 So. (2d) 435 (1944).

will be subject to the same temptation to terminate unlawfully the life insured as if he himself had taken out the policy, yet the law considers this danger too slight for notice, since the insured selects the person to be thus tempted. The court further recognized the power of the insurer to waive the policy provision and upheld the designation of a beneficiary without insurable interest.

(2) Elective Benefits

In almost all forms of life insurance policies are to be found many terms and conditions setting forth various elective benefits to the insured as well as to the beneficiaries after death has matured the policy. While the policy remains in force an election of one of these benefits constitutes the acceptance of an irrevocable offer.

In *Mutual Life Ins. Co. v. Kaiser*[7] the insured made written election of his right to surrender his policy for its cash value; and although he died before receiving payment, the court very properly held that the insurer's liability had ceased to be contingent and had become a matured debt.

"Policy loans" are among the usual group of elective benefits, but as declared in *Ford v. Mutual Life Ins. Co.*,[8] they are not loans but mere advancements, at interest, which are made and are solely collectible from the accrued policy reserve.

(3) "Good Health"

"Good health" as employed in an insurance contract is used in its common and ordinary sense and means a reasonably good state of health, as compared with perfect health. This was the holding of our court in *Woodmen of the World Life Ins. Soc. v. Johnson.*[9]

Standard Life Ins. Co. v. Baldwin[10] reannounces the rule that the issue of "good health" at the time of the original issue or any revival of a policy is an open question without regard to the warranties in the application therefor.

(4) "Total Disability"

The legitimate and ultimate purpose of insurance is to protect against loss of earning capacity, and the question at last is whether the particular case comes *ex aequo et bono* within that purpose.

---

[7]193 Miss. 581, 10 So. (2d) 766 (1942).
[8]194 Miss. 519, 13 So. (2d) 45 (1943).
[9]196 Miss. 1, 16 So. (2d) 285 (1944).
[10]24 So. (2d) 360, (Miss. 1946).

In *New York Life Insurance Co. v. McGehee*[11] the insured was suffering from osteomyelitis in the right leg, which disabled him from performing his usual occupation; but subsequently he was appointed as postmaster, the duties of which office he was neither prevented nor substantially hampered in performing.

In deciding that MeGehee was not totally disabled the court gave effect to the provision of the policy that the disability must be such as to prevent the insured from engaging in any gainful occupation whatsoever. This holding was in apparent conflict with such decisions as *Mutual Benefit Health & Accident Ass'n v. Mathis,*[12] defining total disability as an incapacity to perform the substantial duties "incident to his *usual* employment or business."

However, in *Mutual Life Insurance Co. v. Baker,*[13] proper limitations were placed upon the MeGehee case and a new rule was announced to cover total disability cases in which the insured is engaging in a gainful occupation.

Under the rule in Baker's case, if the employment is (1) consistent and regular, (2) is such that he can and does personally perform the work required thereby, without the necessity of hiring assistance, and (3) is for a compensation which bears just comparison to the insured's usual employment or business, then the insured must establish by clear, direct and unequivocal evidence either (a) that there is real hope of a cure, which can be only accomplished by refraining from the ordinary exertions of any fixed employment; or (b) that his condition is without real hope of a cure; but that the ordinary exertions of any fixed employment would probably seriously and dangerously aggravate his condition and substantially more than if he were not employed; or (c) that the pain and suffering resulting from the ordinary exertions of any fixed employment would be unbearable by a person of average or normal fortitude.

If the phrase "any fixed employment" is limited to the insured's usual employment or the employment in which he may have been engaged when liability was denied—and it is evident that the court so intended—this rule affords to both the insured and the insurer the protection which was the ultimate purpose of the insurance contract.

(5) Double Indemnity

This "rule of reason"—the basis of the common law—was applied in two recent decisions dealing with the double indemnity provision com-

[11]193 Miss. 549, 10 So. (2d) 454 (1942).
[12]169 Miss. 187, 142 So. 494 (1932).
[13]197 Miss. 438, 19 So. (2d) 739 (1944).

mon to life insurance contracts. In *Equitable Life Assur. Society v. Askew*[14] the court declared it necessary for the beneficiary to prove that accidental injury and not an existing active disease was the factor which caused death. And in *Lamar Life Ins. v. Bounds,*[15] where the insured was violating the law at the time his accidental death occurred, the court held that there must be a substantial causal connection between violation of the law and injury to avoid policy coverage.

Thus "substantial causal connection" is seen to be the principle upon which the beneficiary may enforce and the insurer may avoid the policy provisions.

(6) Incontestability Clause

However, in *Modern Woodmen of America v. Kehoe,*[16] it is difficult, if not impossible, to locate an application of this "rule of reason."

The policy provided that if death occurred in consequence of any violation of law it should "be null and void and of no effect." The policy also contained a two-year incontestability clause. The insured died 20 years later in consequence of a violation of law; the court, by a "three-three" decision, held that the defense carefully preserved by a condition subsequent could not be asserted since the two-year incontestability period had expired.

The incontestable clause should be construed merely as an agreement on the part of the insurer not to contest the validity of the policy as written except within two years. But, as construed in the Kehoe case, it is a sword—not a shield—which strikes down a salutary policy provision, inserted as a condition subsequent to control the risk against a hazard not to be insured against. Only those defenses which, within the two-year period, were available to the insurer could be shut off by the incontestable clause with sound reason. It is surprising that this clause should be employed to convert a refusal to pay if a stated contingency should happen at any time into a promise to pay if such contingency should happen after two years.

C. Construction of the Fire Policy

(1) Control of the Risk

Control of the risk assumed under an insurance contract is usually accomplished by promissory warranties and conditions subsequent.

---

[14]194 Miss. 347, 11 So. (2d) 441 (1943).
[15]25 So. (2d) 707 (Miss. 1946).
[16]25 So. (2d) 463 (Miss. 1946).

In *Home Insurance Co. of N. Y. v. Northington*[17] the soliciting agent knew of existing mortgages when the policy was issued; and a mortgage subsequently executed was paid before loss occurred. The policy provided that it should be void if the property insured was encumbered (a) at time of issuance, or (b) subsequently. However, neither the reason for the promissory warranty nor for the condition subsequent was violated; and a recovery was therefore allowed.

For a like reason, *St. Paul Fire & Marine Ins. Co. v. Staten*[18] was affirmed. Here the sole and unconditional ownership clause was interpreted to refer to "the substantial, beneficial and equitable owner on whom loss would fall."

These interpretations furnish the insurer a just control of the risk, but not an unjust escape from the risk.

V.

PLEADING, PRACTICE AND PROCEDURE

*John C. Stennis**

A. Limitation of Actions

(1) Accelerated Payments

Thomas v. Fidelity Mutual Life Ins. Co.[1] is a case of practical value. Promissory notes, with a deed of trust securing same, were dated Jan. 1, 1924 and due Jan. 1, 1926, 1927, 1928 and 1929; the security provided, "if any portion of the indebtedness secured is not paid when due, the owner may declare all of same due and direct foreclosure." No payment of interest or principal was ever made; the deed of trust was foreclosed Dec. 17, 1932. Plaintiff sought to cancel the trustee's deed on the ground that the default in payment of the first note accelerated the due date of all other notes and hence they were all barred by the statute of limitations on the date of the sale. It was the holding of the court that under the particular clause above quoted, in the deed of trust, some affirmative action by the holder was necessary before the due dates of all were advanced; the first note was barred on the date of the sale, but as the holder took no affirmative action to accelerate the due date of the other notes, they did not become due until their expressed due

---

[17]23 So. (2d) 537 (Miss. 1945).
[18]26 So. (2d) 538 (Miss. 1946).
*Circuit Judge, Sixteenth Judicial District; DeKalb, Mississippi.
[1]196 Miss. 222, 15 So. (2d) 915 (1943).

date; hence the foreclosure, being within six years of their expressed due date, was valid.

(2) Surety Bonds

In *Alexander v. Carsley*[2] plaintiff sued a highway patrolman and the surety on the patrolman's official bond, for an assault alleged to have been committed on plaintiff by the patrolman while on official duty. The trial court held the one year Statute of Limitations[3] applied, and gave judgment for defendants. The Supreme Court held the action was not for just a simple assault and battery but that it alleged a breach of the surety bond, to which the one year Statute of Limitations would not apply; the case was therefore reversed and remanded.

B. Removal of Causes

An interesting question, among the many that arise on the subject of removal to the Federal Court, is illustrated in *Midsouth Paving Co. v. State Highway Commission.*[4] A road contractor sued by attachment in Chancery a manufacturing company, a foreign corporation, as principal defendant and the Mississippi Highway Commission, alleged to be indebted to the principal defendant. A motion by the Highway Commission for dismissal as to them was sustained; whereupon the cause was removed to the Federal Court on motion of the principal defendant. The plaintiff then appealed from the order of dismissal as to the Highway Commission. On a motion to dismiss the appeal, the court held that ordinarily a final decree against all parties to a suit is necessary before an appeal will lie as to any; but the rule fails when the reasoning fails, and where dismissal as to one defendant enables the remaining defendant to remove to the Federal Court, thus depriving the trial court of the power to render a final decree, the original order of the trial court dismissing the resident defendant may be appealed by the plaintiff. The removal of the principal cause would not deprive the Supreme Court of jurisdiction to entertain the appeal. The motion to dismiss was overruled.

The case was decided on the merits in *Midsouth Paving Co. v. Trinidad Mfg. Co.*,[5] and the lower court's decree dismissing the cause as to the State Highway Commission was reversed and the cause remanded. The main case at that time was in the Federal Court, its fate being unknown to the writer.

---

[2]25 So. (2d) 709 (Miss. 1946).
[3]Miss. Code Ann. (1942) § 732.
[4]197 Miss. 751, 20 So. (2d) 834 (1945).
[5]197 Miss. 751, 21 So. (2d) 646 (1945).

C. Judgments

(1) Co-defendant's Discharge

A most unusual situation is presented in *Gillespie v. Brewer.*[6] In a personal injury action all defendants except defendant Gillespie paid plaintiff $3500 in discharge of their liability. The case proceeded to judgment against all; thereafter, Gillespie moved to vacate the judgment on grounds that it was tainted with fraud by the undisclosed payment. The court held the action and judgment being joint was good notwithstanding the undisclosed payment and discharge, but that an execution against the remaining defendants would be credited with the $3500. This sound case presents an odd and rare situation.

(2) Vacating Judgments

It is very difficult to have a judgment set aside. In the case of *Lott v. I. C. R. Co.*[7] it was held that a motion to vacate a judgment formerly rendered, for error of fact unknown to the court (the old writ of error coram nobis procedure), would not lie in a court of a justice of the peace, as such court is without power to set aside a judgment rendered by it at a former term.[8]

Where a trial court has jurisdiction of the subject matter and the parties and renders a judgment at a term of court, it is without power to set aside the judgment after the term is concluded. In *Strain v. Gayden*[9] the judgment was taken by default after five days service and the defendant had failed to file a plea or obtain an extension of time in which to plead because of a mistaken belief that the case had been continued for the term. There was no element of fraud nor estoppel as to plaintiff. At the next term defendant moved that the judgment be set aside. The motion was denied because under the facts the trial court was powerless to disturb the judgment.

D. Witnesses

(1) Instructions

In *Genola v. Ozburn,*[10] an auto collision case, plaintiff called her physician as a witness, but did not call her husband, who was an eye witness. Defendant sought an instruction to the effect that evidence not presented by plaintiff could be presumed to be unfavorable to her. The

---

[6]10 So. (2d) 197 (Miss. 1942).
[7]193 Miss. 443, 10 So. (2d) 96 (1942).
[8]See Howell v. Kersh, 152 Miss. 266, 119 So. 186 (1928).
[9]197 Miss. 353, 20 So. (2d) 697 (1945).
[10]194 Miss. 235, 11 So. (2d) 910 (1942).

court held this instruction was directed at husband's failure to testify, and emphatically declined to extend the doctrine of "unfavorable inferences" announced in *Killings v. Metro. Life Ins. Co.*,[11] wherein the plaintiff failed to call his physician.[12]

(2) Public Policy

In *Powell v. Powell*,[13] a divorce action by the husband against the wife on a charge of adultery, the husband offered the sixteen year old son of the parties as a witness to certain circumstances tending to establish the adultery charge. The trial court refused to permit the witness to testify. The Court held that the rule against permitting children of tender years to testify would not apply in cases where the child, as here, was old enough to evaluate the facts he observed. There was no question of public policy involved in this case that would not likewise apply to a child twenty-one years of age. Because of the refusal of the trial court to admit the testimony of this witness, the decision was reversed.

(3) "Invoking the Rule"

We often use the expression "place the witnesses under the rule," but do not always realize the extent and implications of the rule. In *Grimes v. Grimes*,[14] a divorce proceeding, the husband rested his case, and the wife introduced several witnesses who testified in her presence. She then offered herself as a witness, but objection to her testimony was sustained because the rule had been invoked as to the witnesss and she had not excused herself during the taking of the testimony of the witnesses. The case was reversed on this point alone on the ground that she had not been given the alternative of "testifying first or leaving the court room, whichever she chose."

E. Pleading

(1) Abatement

In *Ross v. Milner*[15] complainants filed suit for cancellation of a land deed on grounds of mental incapacity of the grantor, then deceased. Grantor's testamentary capacity was then being tested in another pending suit. Therefore, a special demurrer to the suit for cancellation was sustained, the order reciting, "said bill is not dismissed, but is remanded to the files until further orders of the court." After the suit on testa-

[11]187 Miss. 265, 192 So. 577 (1940).
[12]For a recent case giving a test as to what constitutes a waiver of privileged communications to a physician, see Clary v. Breyer, 194 Miss. 612, 13 So. (2d) 633 (1943).
[13]22 So. (2d) 160 (Miss. 1945).
[14]197 Miss. 315, 20 So. (2d) 662 (1945).
[15]194 Miss. 497, 12 So. (2d) 917 (1943).

mentary capacity was tried, on motion of one not a party to the suit but who claimed an interest in the land, the suit for cancellation was restored to the docket; and on the same date, on motion of the clerk under Sec. 1578, Code of 1942, and without notice to the complainant, the cause was dismissed as a "stale case." The complainant then filed a bill of review, which was dismissed. On appeal, it was held that any party in interest would have a right to seek the restoration of the case to the docket, but final disposition should not be made to the prejudice of any party litigant without reasonable notice to them and a chance to be heard; and Sec. 1578, Code 1942, permitting the clerk to move for dismissal the cases wherein no steps have been taken for two terms preceding does not apply. When a case is abated or is retired to the files, it rests "within the bosom of the court" until revived. The case was reversed.

Neeley v. Martin[16] was an action for the value of trees cut, filed on Jan. 1 in Tallahatchie County and on motion transferred to Grenada County. Defendant later filed a plea in abatement to the effect that another suit had been filed in Grenada County on Sept. 1 of the same year between the same parties for replevin of the logs cut from the same timber, and moved that the first case be dismissed. It was held that, assuming the actions were identical, a fact which is necessary for such a plea to prevail, it is the action filed second in point of time, and not the first, that abates.

(2) Inferences

In *Taylor v. Twiner*[17] a bill to vacate land partition proceedings was filed by two tenants in common as complainants, who alleged they were never served with process and had no other knowledge of the original partition proceedings. Special demurrers raised the affirmative defenses of the ten year Statute of Limitations,[18] the two year Statute on bills of review,[19] and the defense of laches and bona fide purchasers for value. These facts were not directly alleged in the bill, but demurrers relied on inferences to be drawn from the bill. The Court held that only necessary inferences can be drawn from the facts as stated, that is, one which is inescapable or unavoidable; this condition is not met if another and different inference may be reasonably drawn from the facts as stated. When it is necessary to establish an affirmative defense, the facts thereof cannot be imported from the adverse plea by

[16]193 Miss. 856, 11 So. (2d) 435 (1942).
[17]193 Miss. 410, 9 So. (2d) 644 (1942).
[18]Miss. Code Ann. (1942) § 709.
[19]*Id.* § 752.

inference unless the inference is inescapable and unavoidable; an appellate court will not settle difficult questions of law and right on a demurrer which raises a doubtful question, although technically correct, and is slow to rely on inference when the facts can be set up in an answer. The demurrers were overruled.

(3) Former Acquittal

In *Tanner v. State,*[20] a prosecution for robbery, the defendant pleaded not guilty and offered to show he had been tried and acquitted on the same set of facts for assault and battery with intent to kill. The trial court sustained the objection to the evidence. The Supreme Court held that ordinarily a defendant in a criminal case can make any defense under a plea of not guilty, but a former acquittal or conviction must be pleaded specially. The court noted, but did not enumerate, that other defensive matters might possibly have to be pleaded specially.

(4) Sunday Contracts

In *Armstrong v. Shell*[21] the Court held that the invalidity of a Sunday contract could be, but did not necessarily have to be, raised by a special plea. The point could be raised just as effectively by an objection to the evidence.

(5) Undisposed of Plea

It was held in *Covington v. Columbia Military Academy*[22] that judgment may be given on the pleadings under certain circumstances, even though there is an undisposed plea of the general issue on file. Plaintiff's action was based on a protested bank check; a copy of the check and notice of protest were filed with the declaration. The defendant pleaded the general issue and, at a later term, filed two special pleas to which a demurrer as to one, and a motion to dismiss as to the other, were sustained. Defendant declined to plead further; and plaintiff's motion for a judgment on the pleadings was sustained, even though defendant's plea of the general issue was still on file. The Court held that plaintiff's declaration with the copy of the check and notice of protest filed therewith made a prima facie case to overcome the plea of the general issue in view of defendant's failure to deny the execution thereof under oath, as provided by Sec. 1750, Code of 1942, the copies thereof being considered, in the absence of objections thereto.

---

[20]196 Miss. 822, 18 So. (2d) 300 (1944).
[21]26 So. (2d) 344 (Miss. 1946).
[22]194 Miss. 99, 11 So. (2d) 807 (1942).

(6) Nonsuit

Some of the cases have not been too clear as to plaintiff's right to take a nonsuit and the latest time therefor. *Mitchell v. Film Transit Co.*[23] is a clear and timely ruling thereon. Complainant, as guardian, filed his suit in the Chancery Court for personal injuries to his ward. Because this suit was pending in the Chancery Court, complainants successfully resisted defendant's suit in Federal Court for a declaratory judgment fixing the principles of the case. After a companion case on the identical facts was decided adversely to complainant's side of the case in the Chancery Court, complainant, as next friend of said minor, filed his same case for personal injuries in the Circuit Court and moved for a nonsuit in his original suit in Chancery Court. The Supreme Court denied complainant the right to take a nonsuit, saying that "when the cause has proceeded to that point, or when already such steps have been taken that the defendant has thereby secured some substantial right, which would be destroyed by the dismissal, a nonsuit will not be allowed." The "substantial right" of defendant was the Chancery Court's ruling in favor of the defendant in the companion case.

(7) Cross-bills

The case of *State v. Harper*[24] is a suit to confirm a land patent. The court held that the patent was invalid, and the State of Mississippi, which was the defendant, sought by motion to have the court expressly cancel the invalid patent. On a general point of pleading the court declined on the ground that "if a defendant seeks more than a defeat of the relief sought by the bill . . . he can only obtain such by a cross-bill."

A cross-bill, once properly filed, cannot be dismissed along with the original bill without a final hearing thereon, even though the dismissal is without prejudice.[25]

(8) Set-off

Wright v. Thornton[26] is a case of practical import. Plaintiff obtained judgment for $105 on a rent claim in the justice court. Defendant appealed and offered in the Circuit Court for the first time an account for repairs of the rented building as a set-off for $123. Plaintiff did not move to strike the plea as being filed out of time under Sec. 1822, Code of 1942. There was no objection to the evidence offered under the

---

[23]194 Miss. 550, 13 So. (2d) 154 (1943).
[24]195 Miss. 580, 15 So. (2d) 680 (1943).
[25]Federal Credit Co. v. Newman, 16 So. (2d) 619 (Miss. 1944).
[26]196 Miss. 395, 17 So. (2d) 437 (1944).

plea and no motion for a peremptory instruction; the case was submitted to the jury on the issue of plaintiff's rent claim for $105 and defendant's labor claim for $123. The jury verdict was for the defendant, and plaintiff first raised the point of the set-off being filed out of time in its motion for a new trial. The Supreme Court held that defendant's failure to file the plea of set-off in the justice court as required by Sec. 1822 was waived; that in the Supreme Court an appellant is confined to the position taken in the trial court, jurisdictional matters excluded; that the set-off plea for $123 first filed in the Circuit Court did not raise a jurisdictional question, as there was general jurisdiction of the case on appeal.

(9) Counterclaim

A striking defect in our procedural law is illustrated in *Moore v. Abdalla.*[27] Plaintiff filed suit for the cost of repairing his car, which had collided with defendant's car. Defendant denied liability and filed a counterclaim for judgment against plaintiff for money spent for repairs of his own car due to the same collision. On the question of defendant being permitted to ask for judgment on his counterclaim, the Supreme Court, following present law, held that we have no provision in Mississippi for judgment over on a counterclaim, even when the counterclaim grew out of the same transaction. The defendant could have used his claim defensively by recoupment, but for practical reasons this is seldom done. Defendant could plead contributory negligence defensively. But the only way of asserting his own claim affirmatively would be to file a new suit, thus causing the jurors, the judge, the witnesses, the court officers and the attorneys to consume another day, or a part thereof, at the expense of the litigants and tax-payers and with inconvenience and delay to all. As long as trial courts are forced to operate under such backward rules, thus forcing jurors and witnesses to leave their homes and spend time in such useless repetitions, these forums cannot long retain the wholesome respect of the people. Recently bills to remedy this situation were passed by both the Senate and the House, but at different Legislative sessions, and hence there is still no law to correct this procedural defect.

(10) Res Adjudicata

An example of the far-reaching effect, at times, of the plea of res adjudicata is seen in the case of *Taylor v. Bell.*[28] A will devised land to five children with the provision that if any died "without bodily heirs" then said child's share would descend to the other children. In a parti-

[27]197 Miss. 125, 19 So. (2d) 502 (1944).
[28]194 Miss. 112, 11 So. (2d) 825 (1942).

tion proceeding by all five children, who alleged they were the true and exclusive owners, the land was divided in kind among the five, who went into separate possession of the tracts. Later, one devisee died leaving his wife as his sole heir; the other four devisees claimed the land under the will. It was held that the court, in the partition suit, had jurisdiction of the subject matter and of the parties; its judgment was res adjudicata of all questions presented and of those questions involved that *could* have been presented; the ownership in fee could have been adjudicated in the decree of partition; and hence, the question is now res adjudicata. The land was awarded to the widow of the deceased devisee.

In *Grant v. Dotson*[29] a demurrer to plaintiff's action in replevin in the county court was sustained on the grounds that the sum demanded was above $1000 (the statutory jurisdiction of the court) and there was no allegation that possession had been demanded. Thereupon, plaintiff filed another suit on the same facts demanding less than $1000 to which defendant pleaded res adjudicata. It was the holding of the Court that the plea was not good for the reason that the demurrer had been confined to matter of jurisdictional amount and procedure and did not go to the merits of the case.

F. Verdicts

(1) Form

The jury verdict in the case of *Rhoades v. Campbell,*[30] a bastardy case, read: "We the jury find for the plaintiff and recommend the payment of $15.00 per month for fifteen years from birth of child." There was no motion to correct or amend, but judgment was entered thereon. The court held that the intent of the jury was unmistakable; that the verdict was neither vague nor uncertain; that final judgment, rather than judgment nisi, against defendant and his bondmen was correct. This is another instance of our practical rule that substance and intent control as to jury verdicts.

(2) Recitals in Judgment

There was a variance between the verdict as recited in the judgment and an unsigned writing found among the papers in the case which appeared to be the verdict of the jury but with no proof that it actually was the verdict returned and no proof that the verdict was not thereafter amended by the jury. On such facts *Burton v. Atkins*[31] holds that

[29]193 Miss. 577, 10 So. (2d) 680 (1942).
[30]197 Miss. 7, 19 So. (2d) 244 (1944).
[31]124 So. (2d) 355 (Miss. 1946). This case is one of first impression in Mississippi in holding valid a chattel mortgage given by parol on personal property of $50 or more in value without delivery of the property to the mortgagee.

the verdict recited in the judgment will control. It seems that a rule of court, or a statute, should provide a strict procedure for the clerk to identify, record and preserve the actual verdict as returned.

G. Venue

(1) Action for Libel

Forman v. Miss. Publishers' Corp.[32] is new law in Mississippi. A newspaper containing an alleged libel against plaintiff was published and first circulated in Hinds County, the domicile of defendant, a domesticated foreign corporation. The paper was then circulated in Sunflower County, the home of the plaintiff, where suit was brought with a local news dealer joined as co-defendant. The news dealer was eliminated on a plea of abatement, and the case dismissed without prejudice as to the publisher defendant. The Court held that the cause of action "accrued" in Hinds County; and under Sec. 1433, Code of 1942, Hinds County was the only proper venue. There was a strong dissenting opinion on the ground that the libel having been published in Sunflower County, a cause accrued there as to the plaintiff.

(2) Local Defendants

A case that just about completes the picture which the Supreme Court has developed for several years on the question of when and how to proceed to eliminate local defendants and thereby secure a change of venue by the other defendants is *Long v. Patterson.*[33] One Jones, a boy 14 years of age, a resident citizen of Prentiss County, and Spicer and Long, adult resident citizens of Lee County, were jointly sued in Prentiss County on a death claim due to personal injuries received by the deceased in a motor vehicle collision. The non-resident defendants moved for a change of venue to their home county on grounds that, conceding plaintiff's allegations in the declaration to be true, the local defendant (minor) was not liable due to his minority. The minor pleaded non-liability by virtue of minority. No fraud was alleged in joining the minor as a defendant. The motions of the non-resident defendants were overruled; the case proceeded to trial with a verdict and judgment against the non-resident defendants and in favor of the minor. The Supreme Court held: (1) Under the allegations of the declaration and proof of minority the minor was not liable. (2) The trial court therefore was advised before the trial on the merits of facts which showed the minor's non-liability, and should have dismissed the cause as to the minor and then

[32]195 Miss. 90, 14 So. (2d) 344 (1943).
[33]22 So. (2d) 490 (Miss. 1945).

granted a change of venue to Lee County. (3) The fact that the joinder of the minor defendant was in good faith was not a pertinent issue when non-liability of the minor was clear.

This case, together with the cases therein cited, furnishes a virtually complete guide on a question that has vexed the Bench and Bar for years.

(3) Public Officers

Sec. 1433, Code of 1942, permits a public officer to remove a case to the county of his residence, even though joint defendants are liable in the county in which the case was filed. This has long been unquestioned statutory law as to Circuit Court cases, and the case of *Holyfield v. State, Use of Adams*[34] extends the rule to Chancery suits as an exception to the general venue statute in Chancery Courts.[35]

H. Trial

(1) Cost Bond

The left-handed side of the "rule for costs" is illustrated in the case of *Archer v. High*.[36] Plaintiff obtained judgment on an open account in the justice court and defendant appealed. The Circuit Court, on motion of defendant, required plaintiff to give security for costs, and on failure so to do plaintiff's cause was dismissed with prejudice. It was held that even though the cause was in the Circuit Court at the instance of the defendant, plaintiff could be required to give security for costs the same as if the cause had been filed originally in the Circuit Court.

(2) Conduct of Case

A trial Judge has the responsibility of creating a judicious atmosphere in which cases may be tried. He often finds his means therefor limited. A recent case affirms a very effective power in regulating the conduct of trials. In *N. O. & N. E. R. Co. v. Miles*,[37] after a dying declaration had been ruled inadmissible in the trial of a civil case, counsel for plaintiff, in his zeal, kept referring to the dying declaration during his examination of other witnesses and in his argument, thus impressing the jurors with its substance and forcing counsel for defendant to make repeated objections. The court held that in such cases the trial court could, and in the exercise of a sound discretion sometime should, declare a mistrial.

---

[34]194 Miss. 91, 10 So. (2d) 841 (1942).
[35]Miss. Code Ann. (1942) § 1274.
[36]193 Miss. 361, 9 So. (2d) 647 (1942).
[37]197 Miss. 846, 20 So. (2d) 657 (1945).

(3) Due Process

In *Carter v. State*[38] the defendant was convicted of murder and the death sentence was imposed. On examination of all the evidence the Supreme Court was of the opinion that the defendant, at the time of the trial, was mentally incapable of remembering and intelligently stating the facts upon which his defense rested. The point was not raised in the trial, but the Supreme Court held on appeal that due to defendant's condition the trial was a denial of due process of law and reversed the case as an exception to the general rule that questions not raised in the trial could not be considered on appeal.

(4) Civil Immunity

On March 1, 1943, defendant was a resident of Coahoma County, Mississippi, where suit was entered against him and personal service had the same day. On July 20, 1943, he moved to Texas and returned to Mississippi January 13, 1944, for the trial of the case. Plaintiff's motion for a continuance was denied; because plaintiff's leading attorney was ill, he took a nonsuit, and immediately filed a copy of the same declaration as a new suit. Defendant was served with personal process before he left the courtroom. Thereafter defendant appeared specially and moved to quash the process on grounds he was attending the other trial as a litigant and witness and was immune from civil process. The Supreme Court held that defendant's position was correct as to the general rule, but where the nonsuit was a necessity under the circumstances and the new suit is on the same cause of action against the same parties, the process in the new suit is valid and binding.[39]

(5) Doing Business within the State

In *Lee v. Memphis Publishing Co.*[40] the publisher of the Memphis Commercial Appeal, a Delaware Corporation, was sued for libel in Webster County, where the alleged libel was circulated and where plaintiff lived. It was alleged that defendant was doing business in the State and subject to suit under Chap. 246, Laws of 1940.[41] The defendant appeared specially and moved to dismiss for want of jurisdiction and for lack of venue. The trial court held that the defendant was doing business in the State, but that the venue was in Hinds County where the Secretary of State resides, and in the absence of a motion to transfer dismissed the suit. On appeal, the Supreme Court decided: (1) That the special

---

[38]21 So. (2d) 404 (Miss. 1945).
[39]Sanders v. Smith, 197 Miss. 304, 20 So. (2d) 663 (1945).
[40]195 Miss. 264, 14 So. (2d) 351 (1943).
[41]Miss. Code Ann. (1942) §§ 1437-1440.

appearance did not subject defendant to the territorial jurisdiction of the court. (2) That even though there was no appeal from the ruling that defendant was doing business in the State, the Supreme Court could pass on that question and base an affirmance or reversal on any ground that was before the trial court under the pleadings. (3) That even though defendant's paper had a circulation of over 40,000 in the State, which it brought into the State with its own trucks, and defendant had bonded distributors over the State and had a State office and news collector and interpreter in Jackson, such facts do not constitute doing business under the statute. The case was dismissed, with two justices dissenting. This decision seems highly important and far-reaching.

Knower v. Baldwin[42] involved Sec. 5346, Code of 1942, which provides that process on a foreign corporation may be served on any agent found within the county where the suit is brought, no matter what character of agent such person may be. This section presupposes that the defendant is doing business within the state, and in the absence of such proof the section has no application. Suit against a foreign corporation based on service on one of its traveling salesmen, who took orders for approval outside of the state, was, therefore, dismissed.

(6) Revival

In a suit to cancel a claim of title through a tax sale, after the trial had been concluded and while the Chancellor had the case under advisement, the plaintiff died. Revival was in the name of the administrator, but there was no allegation that he had any interest in the land or that the land needed to be sold to pay debts of the estate. After a decision in favor of the administrator-plaintiff, reversal was sought on the grounds that the revival should have been by the heirs. The Court reasoned that if the decree had been adverse to the administrator it would not have been binding on the heirs, and therefore it does not settle the controversy between the heirs and the defendants. The revival should have been in the name of the heirs.[43]

(7) View Precluding Proof

Hester v. Bishop[44] is a suit for abatement of an alleged nuisance. The Court heard the evidence for the complainants, then personally viewed the premises in question and dictated into the record a review of his observations on the premises, including some remarks of school

---

[42]195 Miss. 166, 15 So. (2d) 47 (1943).
[43]Saxon *et ux* v. Robinson, 25 So. (2d) 776 (Miss. 1946).
[44]193 Miss. 449, 10 So. (2d) 350 (1942).

children seen at the place. The Court rejected defendant's offer to present proof, and a final decree adverse to defendant was entered. The Supreme Court held that the right to be heard is fundamental and cannot be precluded by a view of the premises. The trier of facts must permit further proof, as all parties have the right to make a record of what witnesses of their own choosing will say, even though the trier of facts has already reached a final conclusion. *Ex parte* oral communications, even at the view of the premises, are excluded as being unsworn and without right of cross-examination.

(8) Weight of the Evidence

The extreme difficulty at times of being able to tell where to put the blame is illustrated in the case of *Horn v. Guthrie*.[45] Plaintiff was a guest rider in a lumber truck which collided on the highway with a coal truck driven by defendant Hobson and owned by defendant Guthrie. Plaintiff was injured thereby and sued the two truck drivers and Guthrie. There was a verdict and judgment in favor of all defendants. Each truck driver attributed negligence to the other and each exonerated himself. The Supreme Court was impressed with the fact that one or the other was negligent, but refused to reverse the case due to the following considerations: (1) The verdict as to all defendants should not be set aside unless the evidence established liability as to all, which it did not. (2) Nor should the verdict be set aside as to one defendant unless against the great weight of the evidence, which it was not. (3) Nor should the case be reversed as erroneous because the court could not definitely point out where the error lay. The plaintiff, having had the burden of proof, had failed to show which one was at fault or that they were both negligent, and therefore could not prevail.

(9) Final Decree

Henderson v. Odom[46] shows a resourceful procedure adopted by counsel for defendants. Defendants, non-residents, being summoned by publication, had failed to answer; decree pro confesso and then a final decree thereon, for the sale of property, were taken against them. Within the two-year period allowed them under Sec. 1391, Code of 1942, to request a rehearing, they appealed to the Supreme Court where the plaintiff sought dismissal of the appeal on grounds that the decree appealed from was not final, and that defendants had not exhausted their remedy in the trial court for the relief sought.

---

[45]21 So. (2d) 813 (Miss. 1945).
[46]22 So. (2d) 159 (Miss. 1945).

The decision of the Supreme Court was as follows: (1) The decree appealed from was final for all purposes until a petition for a rehearing thereon was filed. (2) Defendants could treat the decree as final and appeal therefrom, thus avoiding the effect of Sec. 1392, Code of 1942, providing that title to any property sold under the decree would not be affected by the rehearing. The motion to dismiss the appeal was therefore overruled. And for a defect in the affidavit for process by publication, the case was reversed when heard on the merits.[47]

I. Appeal and Error

(1) Interlocutory Appeals

In *Smith v. Atkinson*,[48] on motion, a preliminary injunction was dissolved, but the decree did not "dispose of all issues raised by the bill." An interlocutory appeal was granted to settle the principles of the case, but bond was not given therefor within thirty days as required by the statute for such appeals. On motion to dismiss the appeal it was held that, as all issues were not disposed of by the decree, the appeal was interlocutory rather than final; and it was, therefore, dismissed for failure to give the bond within the statutory time for such appeals.

In a kindred case it was held that an interlocutory appeal is not allowable upon a demurrer when some, but not all, of the parties defendant have demurred.[49]

(2) Perfecting Appeals

That the right of appeal is statutory and rather strictly construed is illustrated by the case of *Tobias Bag Co. v. Delta Cotton Oil Co.*[50] After an adverse lower court judgment appellant gave notice of appeal to the court reporter in due time and executed an approved appeal bond. Before transcribing his notes the court reporter died. Before signing a bill of exceptions, the trial judge died. And eight months after the trial and before getting the case to the Supreme Court by signing a bill of exceptions himself under Sec. 1533, Code of 1942, the plaintiff's trial attorney died. There was no fraud or fault in the opposing litigant. Thereupon, appellant filed the same suit in the Chancery Court seeking relief from the former adverse judgment, and to recover a new judgment. The Supreme Court held that since the right of appeal is purely statutory, the method prescribed must be strictly pursued. Appellant was

---

[47]Henderson v. Odom, 22 So. (2d) 416 (Miss. 1945).
[48]193 Miss. 554, 10 So. (2d) 379 (1942).
[49]Johansen v. McMillan, 195 Miss. 390, 15 So. (2d) 692 (1943).
[50]193 Miss. 873, 11 So. (2d) 210 (1942).

inexcusably at fault in failing to perfect his original appeal. The complaint was dismissed.

(3) Appeal Bond

A case involving facts frequently found in practice is that of *J. R. Watkins Co. v. Guess,*[51] wherein plaintiff obtained a judgment for $167 in the justice court. The defendant appealed, but instead of filing an appeal bond he gave his personal check for $250 to the justice of the peace, who delivered same to the circuit clerk, who forthwith cashed it. In the Circuit Court judgment was rendered for the defendant, who was thereupon paid the $250 by the clerk. On appeal the Supreme Court held that Sec. 1198, Code of 1942, on appeal bonds is mandatory and jurisdictional; that there was a complete absence of any attempt to tender or file a bond and, hence, the Circuit Court was entirely without jurisdiction. The case was reversed, leaving the original judgment of the justice court in effect. The case illustrates its own soundness because here we have a successful plaintiff in the justice court, who had to fight an appeal in the Circuit Court and then appeal to Supreme Court, where he obtained an affirmance of his original judgment, which was not secured by a bond upon which he could collect his money.

In a prior affirmance of the case of *Sample v. Romine*[52] the Supreme Court Clerk included in the judgment the 5% statutory damages against the appellant, even though the appeal bond had been granted by the Chancellor to settle the principles of the case and the Supreme Court had not expressly allowed nor disallowed the damages. On a motion to correct the judgment it was held: (1) Interlocutory appeals are for the benefit of all parties, and the 5% penalty does not apply in such cases.[53] (2) The Supreme Court has the inherent power to correct a judgment it did not intend to render, whether at that term or at a subsequent term; in contrast, a change or modification of a judgment rendered as intended can be made only on suggestion of error seasonably filed.[54] The same rule as to correcting a judgment erroneously rendered applies to the Circuit and Chancery Courts.

The question of the 5% penalty was also involved in *Ellis v. M. & F. Bank,*[55] which held that the 5% penalty provided by Sec. 1971 will not be imposed on a cross-appellant, who does not bring a suit to the Supreme Court, but merely follows it there where it is affirmed on his cross ap-

---

[51]196 Miss. 438, 17 So. (2d) 795 (1944).
[52]193 Miss. 706, 10 So. (2d) 346 (1942).
[53]Miss. Code Ann. (1942) §§ 1148, 1971.
[54]*Id.* § 1670.
[55]193 Miss. 557, 10 So. (2d) 541 (1942).

peal. The 5% penalty was held to apply in another case wherein an unsuccessful appellant claimed the right to hold leased premises under an alleged agreement to purchase the land in controversy.[56]

(4) Amount in Controversy

Under Sec. 1201, Code of 1942, providing that appeals from the Circuit Court to the Supreme Court, in cases appealed from a justice court, shall be limited to cases where the amount in controversy is $50.00 or over, the "amount" is the principal amount and does not include the interest thereon. An appeal involving a judgment for the principal amount of $46.80, plus $8.32 interest, will be dismissed by the Supreme Court, by its own motion, for lack of jurisdiction.[57]

(5) Supersedeas

In holding that the granting of an appeal with supersedeas by the trial court in an election case was an abuse of discretion, the Supreme Court, in *Sartin v. Barlow*,[58] pointed out that supersedeas is granted as a matter of right only (1) where there is a money decree or judgment,[59] or (2) where there is a decree or judgment for the recovery or against the retention of property,[60] or (3) where the decree directs the sale or delivery of possession of real estate[61]—provided the decree is final and bond in double the value of property is given. Sec. 1169, Code of 1942, covers the general powers of trial courts in all other instances, and said powers are therein discretionary. This is a good case for a review study of the law on this subject.

(6) Supreme Court Rules

The rules of the Supreme Court will doubtless have to be enforced more rigidly, and amended also, to enable the court to cope with the voluminous records coming to them. *Fredric v. Bd. of Sup'rs, Jackson County*[62] is an important decision and extends a sound rule. The brief of counsel for appellant set forth a concise statement of the facts forming the basis for the judgment from which the appeal was taken; this was in accordance with Rules of Supreme Court, Rule 7, Paragraph 2. Counsel for appellee neither challenged appellant's statement of facts nor set forth in his brief a different statement of facts. The court held that appellee

---

[56]Hodge v. Jones, 197 Miss. 107, 19 So. (2d) 917 (1944).
[57]Gardner v. Bookout, 26 So. (2d) 343 (Miss. 1946).
[58]196 Miss. 159, 16 So. (2d) 372 (1943).
[59]Miss. Code Ann. (1942) § 1163.
[60]*Id.* § 1165.
[61]*Id.* § 1167.
[62]197 Miss. 293, 20 So. (2d) 671 (1945).

could not later complain if the statement was adopted by the court as correct and appellee could not raise this alleged incorrectness for the first time on suggestion of error. This case is a fair warning to any attorney involved in an appeal.

VI.

PROPERTY

*L. G. Fant, Jr.**

In a field of the law so traditionally conservative as Titles, the element of novelty can hardly be expected. From the decisions falling under that head, excluding those which are subjects of separate notes and comments and those of a more specialized nature, such as tax titles, mineral rights, and landlord and tenant, the following cases are believed to merit notice in this review.[1] These are, themselves, diverse in nature, and afford little opportunity for continuity of thought.

Two decisions deal with accretion and avulsion.

The hornbook law of alluvion is stated and applied in one case[2] where the issue, between private litigants, was the location of the boundary between Louisiana and Mississippi. Appellants had brought suit in Louisiana to recover damages, by way of attachment, for the cutting and conversion of timber. Appellees, the defendants in Louisiana, brought their bill in Mississippi to enjoin the prosecution of the action in Louisiana, alleging that the land lay wholly within the State of Mississippi. All parties were resident citizens of Mississippi. The Court received evidence of the location and changes of the course of the Mississippi River during 120 years. This evidence consisted of the testimony of expert witnesses with reference to maps, charts, drawings and photographs, ancient and modern. As stated in the opinion, it is not clearly intelligible without benefit of the exhibits. Applying inferences established by the testimony of the expert witnesses, the Court found that part of the land lay in Mississippi, and part in Louisiana. Upon that finding, the decree of the lower court enjoining the action as to any part of the land in the courts of Louisiana was affirmed.

---

*Professor of Law, University of Mississippi; member Mississippi and Marshall County Bars; Holly Springs, Mississippi.

[1]The cases considered herein were selected from Vols. 193-198 of the Mississippi Reports and Vols. 24, 25 of the Southern Reporter (2nd series).

[2]Sharp v. Learned, 195 Miss. 201, 14 So. (2d) 218 (1943).

The principal question, other than the issue of fact, appears to involve conflict of laws. The plaintiffs in Louisiana derived their title through Louisiana sources. In appealing from the decree enjoining their suit, they argued that the appellees had not in any event shown title in themselves. This contention was dismissed by the Court with the statement that it was immaterial, since if the land were in Mississippi, the appellants had no title on which to found their suit in Louisiana. The Court recognized, however, that its determination of the state boundary would not be binding on the State of Louisiana. It is believed that the ultimate question of title to lands may, of necessity, be left open, since it would appear that a Louisiana Court might, with equal propriety, find that the land lay in the State of Louisiana and that the appellants therefore had title to it.

Within this view, the action of the Court in enjoining the prosecution of any suit in Louisiana, even as to that part of the lands which it finds are within the State of Louisiana, appears open to question. The reason for so doing is stated as "It has long been a cherished policy in this state, and to which its citizens are required to give allegiance, that all questions or issues germane to any principal issue in litigation between the parties shall be settled, if possible, in one and the same suit, and this is particularly true as respects our courts of equity. Here the principal issue, to which the others are subsidiary, is where was the territorial line between the two states at the time of the alleged conversion. . . . Under the ancient jurisdiction in equity in respect to boundaries, and the power therein to settle all issues, appellants may file a cross bill in the present case for their recovery in damages. . ."

Since all parties were citizens of Mississippi, it is conceded that the Court had the power to enjoin. But since part of the land was found by the court to lie in the State of Louisiana, the propriety of exercising that power may be questioned. Implicity in the quoted language appears to be an assumption that the Court has power finally to determine, between the parties, the question of damages for trespass to lands within Louisiana.

Further exploration of this doubtful question is more concerned with conflict of laws than with property.

The meaning of the term "accretion" used in an exception to lands described by government survey was at issue in another case.[3] The grantor conveyed land in fractional sections bounded on the south by the Mississippi River, describing it by sections, and excepting from the con-

[3]Anderson-Tully Co. v. Campbell, 193 Miss. 790, 10 So. (2d) 445 (1942).

veyance, "all accretions adjacent to the South of the south line of said sections. . . ."

The land was surveyed and platted by the United States in 1823. The field notes of that survey, in evidence, established the "then shore lines" of the River. Thereafter, the River, by erosion, encroached on the land to the north. It then receded gradually, leaving an accretion until it reached its present banks, south of the position shown by the field notes of 1823. The land in controversy was that lying between the northernmost line of the river bank, and the shore line of 1823; it being conceded that accretions to the south of the line of 1823 were excepted. It was argued for those claiming under the grantor that the survey of 1823 establishing a meander line of the bank of the River did not establish that line as the boundary of the sections surveyed, but as defining the banks of the stream; that the water course constituted the boundary, and not the meander line of the water course as actually run. This argument was not accepted by the Court, which held that the deed conveyed all land within the lines as surveyed in 1823, and no more.

While the distinction presented by the argument is fine, it is also difficult to escape. It occurs in every decision concerning boundaries by streams. For the hornbook rule is that where land is bounded by a water course, by a construction of the intent of the parties it receives the benefit of accretion and bears the burden of erosion. Where it is bounded by a line independent of the water course, though following it ever so closely, the intent cannot be so construed. This would present a nice inquiry of the effect of the deed in litigation if it had contained no exception.

An interesting phase of the case discussed is the use by the Court of the phrase "shore line." Probably it followed from the terms of the field notes in evidence. Yet the term implies consideration of a boundary by a navigable body of water. It is also noted that the argument of appellants, referred to above, was addressed in terms to "lands bordering upon navigable rivers." The previous decisions of the Court have been that, for purposes of boundary, the Mississippi River above tide water is a non-navigable stream, and riparian owners own to the thread.[4] What difference this principle might have made, and it is not believed that the decision overrules it, cannot be learned from the reported opinion.

The decisions on adverse possession offer little basis for comment.

---

[4]Archer v. Bd. of Miss. Levee Com'rs, 158 Miss. 57, 130 So. 55 (1930); Archer v. Greenville Sand & Gravel Co., 233 U.S. 60, 34 S.Ct. 567, 58 L.Ed. 850 (1914).

A railroad company, having acquired rights of way by deed, could not acquire the fee by its mere use of the land, however long continued.[5] That obvious decision affords one small point of interest, that is, the effect of a railroad company's giving a deed of trust upon its rights of way.

In the decided case, the original purchaser of the rights of way, a railroad company, executed deeds of trust of the rights of way to secure an indebtedness. There was a subsequent foreclosure of the deeds of trust, and the rights of way were bid in and purchased at the foreclosure sale by an individual. This occurred in 1887, and the purchaser on the same date conveyed to another railroad company which subsequently merged with the Y. & M. V. Railroad Company. The argument of those claiming the fee under deed from the Y. & M. V. Railroad Company was that the conveyance of "rights of way" by foreclosure sale to an individual, set up an adverse claim inconsistent with an easement. The Court disposed of this contention by saying that Calhoon, the individual purchaser, on the same date "conveyed what he acquired, an easement, to another railroad company. . . . so that Calhoon was a mere conduit of title from one railroad company to another, and adverse possession in this case could not stem from such intervention in the chain of title without more."

If the language quoted means that in substance, if not in form, there was a conveyance of the right of way from one railroad company to another, and no abandonment of the easement, from a practical view there is no room for criticism. In theory, however, an interesting question is raised. What is the effect of a deed of trust on an easement of right of way other than as an appurtenance to a possessory interest? Is a railroad right of way a possessor interest? An easement, by definition, is non-possessory, or incorporeal. A right of way for a railroad, however, is peculiar, since it confers the right of exclusive occupancy.[6] And it has been held to amount practically to an estate.[7] In this connection it may be noted that a substantial argument was made that the original deeds conveyed fees simple; that they were not determinable because they contained no express words of reverter. To distinguish between a right of way carrying with it a right to exclusive possession on the one hand, and a fee simple determinable on the other, will require the metaphysical touch. In the case discussed, the Court, properly it is believed, followed the form of the instrument, held that the interests were easements, that abandonment terminated them.

---

[5]Williams v. Patterson, 198 Miss. 120, 21 So. (2d) 477 (1945).

[6]51 C.J. 540 n. 99(1-10), cases collected.

[7]*See* Bowers v. Atchison, T. & S.F.R.Co., 119 Kan. 202, 237 P. 913, 42 A.L.R. 228 (1925).

Where acts of adverse possession for the required length of time appeared independent of the maintenance of a fence, the condition of the fence as to whether it would "turn cattle" during any continuous period of ten years was immaterial.[8] The Court reserved the question, whether if the enclosure were the only acts of adverse possession the fence would have to be maintained for the statutory period in a condition to exclude cattle.

Seven acres were claimed by *A, B, and C*. *A's* ancestor had entered and taken possession, without color of title more than 31 years before the filing of the suit. *B* was the holder of the record title. In 1928, *A* had conveyed other lands to *C's* grantor, and delivered possession of the disputed seven acres as if it were included in the description of the land conveyed, the grantee executing a purchase-money deed of trust which was not satisfied until 1935, less than ten years prior to the filing of the suit. *C* prevailed.[9]

The claim of *B*, holder of the record title, yielded to the fact of actual continuous adverse possession, as found by the Court. The claim of *A*, on the facts was also barred by the adverse possession of her grantee, the Court holding that the deed of trust, which employed the same description contained in the deed and did not include the seven acres, was immaterial. The Court, however, rested its decision against the claim of *A* upon another ground, saying, ". . . the 7-acre disputed area was mutually understood by the grantor and grantee to be a part of the consideration for which the latter executed the purchase money mortgage, and that having fully paid the purchase price, neither the grantor nor her heirs could successfully assert any valid claim thereto."

Upon this issue, the Court examined the intention of the grantor, as expressed by her to persons other than the grantee, and said: "Moreover it is unreasonable to suppose that under all the facts and circumstances she intended to reserve a 7-acre strip of land within the enclosure of fields and pastures then being delivered to the grantee, without ever mentioning such fact to either Mrs. Kersh or to Edwards, the daughter and son with whom she thereafter made her home . . ." Is the implication to be that if she had mentioned such fact to her son and daughter, the 7-acre strip (now valued at $200,000) would have remained her property until she lost it by adverse possession? Where was the title to the disputed seven acres on the day after her conveyance, in her, or in her grantee? Would the answer be different, if she had acquired the seven acres by purchase instead of by adverse possession?

---

[8]Snowden & McSweeney Co. v. Hanley, 195 Miss. 682, 16 So. (2d) 24 (1943).
[9]Kersh v. Lyons, 195 Miss. 598, 15 So. (2d) 768 (1943).

It is believed that these inquiries, though collateral to the issues actually decided merit attention. Generally accepted it is, that grantor and grantee may together apply the written description to the land itself and so establish boundaries as to bind themselves by such application. But the facts to which the opinion of the court refers do not include such. It is usually stated that land acquired by adverse possession is lost only by conveyance or by other adverse possession. It is believed that the intimation that the fact of such conveyance may depend upon the absence of collateral declarations of the grantor is novel and of doubtful value.

Where mineral rights had been severed, possession of the surface coupled with color of title to the minerals was ineffectual against the holder of the record title to the minerals.[10] The decision is clear, and the chief point of interest is the manner in which the question arose. Mrs. Cook conveyed land to Goss, the deed reciting: "There is excepted from this conveyance all oil, gas, and mineral deposits on said lands, which the grantors have promised to convey to A. B. Cook." A. B. Cook undertook to convey the mineral rights to Goss. *Held:* (1) The exception was operative; (2) No interest was conveyed to A. B. Cook; (3) The possession of the surface for the statutory period, though coupled with such color of title to the minerals, did not constitute adverse possession of the minerals against the grantors who had excepted the minerals from their deed.

A deed which conveyed to the grantee an easement over a two-foot strip of land for the purpose of building a stairway leading from the street level to the basement of a proposed building did not authorize construction of the building over the two-foot strip and a mandatory injunction for removal of the building should have been issued.[11]

The grantee's contention was that the easement as granted carried with it by necessary implication the right to construct a wall for support of the stairway. This was rejected by the Court for the reason that the stairway as constructed led up to the second story instead of down to the basement.

It is believed that this opens an interesting inquiry. Suppose the only difference in user from the grant had been the construction of a stairway leading up, instead of one leading down, could the owner of the servient estate complain? The grant by express terms provided that the grantee was "to have a perpetual right to a stairway adjoining the

[10]Cook v. Farley, 195 Miss. 638, 15 So. (2d) 352 (1943).
[11]Turner v. Morris, 196 Miss. 297, 17 So. (2d) 205 (1944).

building now known as the bus depot, leading from Front Street to the basement of the building which is to be erected."

Grants of easement are subject to the same construction as other instruments. The words seem unequivocal. Yet if the light of surrounding circumstances is admitted, it is difficult to see that the provision that the stairway should lead down is material to the grantor.

If a stairway leading down had in fact been constructed, what rights in the two-foot strip would have remained in the grantor? By the general rule, he could make any use of it not inconsistent with the easement. What this might be, other than passage down the stairway is difficult to imagine. Looking, therefore, to the substance rather than to the form, might it not be forcefully argued that the grantor has in effect divested himself of all substantial rights in the strip of land? That the intent, so construed, is to grant more than the usual easement of way? It is believed that if a stairway leading down had been constructed, the grantee might have had the right, by necessary implication, to enclose it.

The decision, however, implies the contrary. Perhaps, so limiting an express grant to its literal words is a safer course, notwithstanding the doctrine of construing most strongly against the grantor. It is believed, however, that requiring by mandatory injunction the removal of a three-story building on such limited interpretation carried formalism to an extreme.

A question of deeds previously noted[12] recurred in several decisions. What provisions in a deed constitute testamentary disposition, so as to invalidate the instrument unless executed in compliance with the Statue of Wills?

One deed conveying land provided for annual payments by the grantee to the grantor during her life, and that upon her death the property would become the property of the grantee. It was argued that this provision made the instrument testamentary in nature. The Court, however, construed the instrument in the light of surrounding circumstances and found the substantial intent to be presently to convey.[13]

Where, however, the deed provided "that this deed of conveyance is not to be delivered or so considered delivered during the natural life of the grantors, but the death of the grantors shall constitute a full and complete delivery of this deed of conveyance to the grantee, and the above

---

[12]Note, *Deeds Testamentary in Nature—Mississippi Law* (1938) 10 Miss. L. J. 183.

[13]Carter v. Dabbs, 196 Miss. 692, 18 So. (2d) 747 (1944).

described land shall immediately vest in fee simple" in the grantee, the instrument was ineffective as a deed.[14] An interesting contrast is afforded to the delivery of a deed in escrow for delivery to the grantee upon the death of the grantor. The Court held in the cited case that the actual delivery of the deed in question was immaterial, since the express provision was too strong to construe as a present conveyance.

In another instrument, the provision was "the title to the above land does not pass to him (grantee) until my death."[15] The Court held that the quoted words, taken in connection with the obligation of the grantee to support the grantor during her life amounted to the conveyance of a present interest. Such construction appears proper; but difficulty is encountered in distinguishing the literal meaning of "title not to pass until my death" from that concerning delivery in the case last noted above.

Two other decisions holding the instruments effective as deeds should be noted, but are too clear for comment.[16]

Where the grantor placed on record a deed conveying land to his minor son, the instrument became then effective.[17] The question arose on the right of the grantee to redeem from a sale for delinquent taxes. If he acquired title when his father placed the deed on record, he was within the period allowed.

The deed was delivered for record to the Chancery Clerk, recorded, and redelivered to the grantor in 1930. The grantor placed the recorded deed in a trunk in his home and retained physical possession of it until 1938. During this period the infant grantee knew of the deed and the Court observes "it was generally understood in the family" that the land belonged to him. The grantor, however, continued to manage the land. In 1938, the grantor actually delivered the deed to the grantee.

The Court held that title passed to the grantee in 1930, and he was permitted to redeem. This appears to establish that in such a case the recording of the deed may take the place of any overt act of delivery. To the same efffect is the language of the decision cited by the Court[18] where a husband conveyed to his wife, and the deed remained in their home. In that opinion, the court said, "Certainly Mr. Lott after the delivery by him of this deed for recordation could not say he had not by actual overt act, open to the world, evidenced his delivery in an accept-

[14]Palmer v. Riggs, 197 Miss. 256, 19 So. (2d) 807 (1944).
[15]Hald v. Pearson, 197 Miss. 410, 20 So. (2d) 71 (1944).
[16]Bryant v. Sevier, 197 Miss. 457, 20 So. (2d) 582 (1945); Watts v. Watts, 198 Miss. 246, 22 So. (2d) 625 (1945).
[17]Beauchamp v. McLauchlin *et ux.*, 25 So. (2d) 771 (Miss. 1946).
[18]Chapman v. Lott *et ux.*, 144 Miss. 841, 110 So. 793 (1927).

able manner. . . ." It was observed, however, that husband and wife do not usually keep their papers separate, one from the other, as though the placing of the paper in the home might have been the delivery. The other decision cited by the Court[19] is of more doubtful weight.

Since the requirement of delivery is said to be, broadly, an act manifesting an intent to place the instrument in operation, it seems desirable that the placing of record by the grantor should meet that requirement, if otherwise unexplained. But the Court has held to the contrary, in a decision[20] not referred to in the opinion discussed.

In that case, a father having signed and recorded a deed conveying land to his son, sued to cancel the deed. The Court held that the presumption of delivery arising upon recording of the instrument yielded to the proof where it was shown that the instrument remained in the possession of the grantor thereafter and there was never in fact a manual delivery to the son. It may be assumed that this decision is overruled, though not mentioned in the opinion. It may, also, be noted that this case is omitted from the appropriate heading of the West Publishing Company's *Mississippi Digest.*

The nature and effect of an executory devise received interesting treatment.

The testator left surviving him a widow, three sons and two grandchildren. He devised land "to my wife and my son Barry, share and share alike," provided that "if my said child die before he arrives at the age of 21 years, then in that event his share of my estate shall go, share and share alike, to the heirs of my body then living."

While the son was alive and under the age of 21 years, the widow filed her bill for partition. The case came before the Court on two appeals. The result was that the land was divided in kind and the widow decreed to hold the part allotted to her in fee simple absolute.

The first appeal was from a decree overruling a demurrer to the bill for partition. This decree was affirmed,[21] the Court holding that the executory devise was no bar to partition between the tenants in common in possession. This appears to be in accord with previous decisions touching remaindermen,[22] and with the statutory provision for partition.[23] In so holding, the Court said: "No right of reversion or remainder is

[19]Young v. Elgin, 27 So. 595 (Miss. 1900).
[20]Lynch v. Lynch, 121 Miss. 752, 83 So. 807 (1920).
[21]Lynch v. Lynch, 196 Miss. 276, 17 So. (2d) 195 (1944).
[22]Black v. Washington, 65 Miss. 60 (1887); Lawson v. Bonner, 88 Miss. 235, 40 So. 488 (1906).
[23]Miss. Code Ann. (1942) § 961.

involved. The interest of those who would take the share of the minor in case of his death before maturity are not involved. Their rights if they should ever have any cannot be adjudicated in this proceeding." This accords also with the language of the Court in holding that remaindermen were not proper parties to a suit for partition.[24]

The second appeal was from a decree confirming a partition in kind made by commissioners and approved by the Court. The decree appealed from apparently vested the widow with a fee simple title to the share allotted to her. The majority of the Court held that decree to be proper, the widow's estate being determined by the will. With reference to the executory devise, the Court said: ". . . in regard to the remaining half interest . . . we could not and did not adjudicate the rights of the several parties who may ultimately become vested with an unqualified fee. . . ."[25]

The Chief Justice filed a partially concurring opinion to the effect that if the son should be divested those who would take on that condition would be entitled to partite anew. This is in accord with the decisions as to remaindermen,[26] and finds support in the language quoted from the opinion on the first appeal.

Both parties moved the Court to clarify its opinion. This motion was overruled.[27] Yet in overruling the motion, the majority opinion said: "There should be no doubt that we intended to hold that the widow's share had all the incidents of a fee simple title, including the right to convey same free of any claims by the appellant or the heirs who would succeed to his estate in the event of his death before becoming of age."

The Chief Justice dissented, saying that this addition to the opinion overrules the authorities previously cited by him,[28] and "attempts to do the impossible thing of deciding now what the effect of the partition here had will be on persons who may come into the ownership of the land in the event Barry Dexter Lynch should die before becoming 21 years of age. This, of course, the Court is without power to do."

The logic of the Chief Justice is flawless. And the authorities cited by him, though they deal with remainders, seem to agree that the partition in such cases is only of the estate in possession in common; yet it is

---

[24]Lawson v. Bonner, 88 Miss. 235, 40 So. 488 (1906).
[25]Lynch v. Lynch, 198 Miss. 479, 23 So. (2d) 263 (1945).
[26]Black v. Washington, 65 Miss. 60 (1887); Lawson v. Bonner, 88 Miss. 235, 40 So. 488 (1906); Bland v. Bland, 105 Miss. 478, 62 So. 641 (1913).
[27]Lynch v. Lynch, 198 Miss. 479, 483, 23 So. (2d) 401 (1945).
[28]See cases cited *supra* note 26.

believed that much may be said in favor of the result attained. Whether the same result would be reached if the land were incapable of division in kind and the prayer was for partition by sale, is left open in the Court's opinion.

If the decree is viewed as divesting the heirs who may succeed to Barry's estate of their interest in the share allotted to the widow, the difficulties are obvious. The *Restatement,* however, adopts the principle that the owner of a future interest, "in the absence of a manifestation of an inconsistent intent by the creator of the interest has a liability that his interest be subjected to partition by the exercise of the power to compel such partition which exists in the owner of a present interest owned in joint tenancy or in tenancy in common and existing in the same or in a different share of the concurrent ownership."[29] And one earlier decision of our Court appears to be in accord.[30]

A possible rationalization of this liability of the owner of a future interest to partition may be found in the view that partition between tenants in common is not a conveyance or divesting of rights, but is the mere application of the interests to the land itself. This view, strained though it may be, is found in the recognition of partition by parol.[31] It may also be noted that the *Restatement* applies the same principle in partition by sale.[32]

An interesting contrast is afforded by another decision. In this case, the testator left surviving one son and four daughters. He devised land to his five children, with this provision, "I especially direct that the land herein mentioned is for heirs, and should any of my children herein mentioned die without bodily heirs, then the part given him or her is to revert to my estate and descend to the other beneficiaries herein mentiond. . ."

The five children were parties to a partition proceeding in which 65 acres was decreed to be the property of the son, who was then married. Later, the son died, leaving his wife as his sole heir. The four daughters claimed the 65 acres by executory devise of their father's will. *Held:* the decree confirming the partition in kind, declaring each party to be "the sole and exclusive owner of the share designated to him" operated as *res judicata* that the respective interests were held in fee simple absolute.[33]

---

[29]Restatement, Property, Future Interests (1936) § 177.
[30]Gwin v. Gwin, 116 Miss. 619, 77 So. 530 (1917).
[31]Pipes v. Buckner, 51 Miss. 848 (1876); Wildey v. Bonney's Lessee, 31 Miss. 644 (1856).
[32]Restatement, Property, Future Interests (1936) § 178.
[33]Taylor v. Bell, 194 Miss. 112, 11 So. (2d) 825 (1943).

Two decisions on the right of homestead may be noticed.

In one, where the wife separated from the husband, without cause, and formed, as the majority of the Court said, a mature intention not to return, the deed of the husband in which she did not join was effective to convey the homestead.[34] The Court distinguished an earlier decision,[35] saying that in that case there was no evidence of a mature intention not to return. Judge Anderson dissented, saying that the decision overruled the previous one.

In the other,[36] the lien fixed by decree of the court on the husband's land in favor of the first wife, to secure the payment of alimony awarded to her, was held paramount to the claim of homestead by the husband and his second wife who moved on the land before the commissioner's sale. Decisions where the subsequent homestead prevailed over liens of other natures were distinguished, the Court saying that the obligation to pay alimony is "of a higher degree" than the ordinary contractual obligation.[37]

VII.

PUBLIC LAW

*Littleton Upshur**

Running through the decisions of the Mississippi Supreme Court during the recent years will be found a line of legal application which delights one who is swayed more by the philosophies underlying the law than by strict adherence to that type of legal construction which sometimes brings about decisions giving rise to the public suspicion of what is called the "technicalities of the law."

The Mississippi Supreme Court, except where felt bound by strict and unequivocal mandates from the legislative body, in its interpretations of statutes as they apply to public bodies and officials has followed in the main the ideal that "law is the perfection of reason and that which is not reason is not law."

---

[34]Philan v. Turner, 195 Miss. 172, 13 So. (2d) 819 (1943).

[35]Zukoski v. McIntyre, 93 Miss. 806, 47 So. 435 (1908).

[36]Felder *et ux* v. Felder's Estate, 195 Miss. 326, 13 So. (2d) 823 (1943).

[37]Two other recent property cases which have been the subjects of Student Comments were Ewing v. Ewing, 198 Miss. 304, 22 So. (2d) 225 (1945), (1946) 17 Miss. L. J. 428; Armstrong v. Itawamba County, 195 Miss. 802, 16 So. (2d) 752 (1943), (1946) 18 Miss. L. J. 177.

*Member Mississippi and Leflore County Bars; Representative from Leflore County; Greenwood, Mississippi.

It is not always possible for a court to maintain that ideal, particularly as regards statutory interpretation, for legislative bodies do not always give sufficient leeway in their statutes for the application of a perfection of reason in their interpretation by the courts. The Mississippi Supreme Court during the past four years has approached the sensible, reasonable application of reasoning in public law probably as closely as it may be safely followed without substituting judicial will for legislative will in enactment of laws for the government of the citizenship.

A. Public Boards and Commissions

In *TriState Transit Co. v. Dixie Greyhound Lines*,[1] wherein the circuit court had reversed a judgment of the Public Service Commission denying an application of the Dixie Company to operate busses for the transportation of intrastate passengers, mail, express and baggage over Highway 51 and where the circuit court in its reversal of the Public Service Commission's order had allowed such service until the expiration of the war and six months thereafter, the Mississippi Supreme Court reversed the circuit court and reinstated the order of the Public Service Commission, saying, "The reviewing court cannot substitute its judgment . . . where there is substantial basis in evidence for such finding or where the ruling is not capricious or arbitrary."[2]

The Supreme Court reaffirmed the rule in such cases "that a certificate should not be granted where there is an existing adequate service over the route applied for, and even if inadequate, unless the existing carrier has been given an opportunity to furnish such existing service as may be required."[3] In this class of cases the Supreme Court goes to the record of the Commission and is not bound by the opinion of the Circuit Court.

An interesting question was posed by Justice Griffith in a special concurring opinion, but which was not answered in the opinion, as to whether denial of an application could be so reversed by a court as to order judgment by the court that the certificate be granted. This question was referred to again in *City of Jackson v. McLeod*.[4]

In suggesting the question Justice Griffith said, "The granting of a certificate of public necessity and convenience is legislative in its nature, unless made mandatory under facts standardized by the legislature. In the absence of special standardized facts, may the legislature impose or

---

[1]197 Miss. 37, 19 So. (2d) 441 (1944).
[2]*Id.* at 47, 19 So. (2d) at 443.
[3]*Id.* at 48, 19 So. (2d) at 444.
[4]24 So. (2d) 319 (Miss. 1946), cited *infra* note 28.

confer on a judicial court the authority to issue a certificate to a motor carrier prospective in its character, and if it could not do so directly, may it do so indirectly by the allowance of an appeal from an order of the Commission which has refused to grant the certificate?"[5]

In *Mississippi State Board of Dental Examiners v. Mandell*[6] the Court, in interpreting the statute authorizing revocation of a dentistry license for certain offenses, held that the statute[7] is penal in nature and must be strictly construed, and that misrepresentation to the Board to warrant revocation must necessarily involve moral turpitude, guilty knowledge and intent to deceive. It was evidently the ruling of the Court that statements not true in fact but substantially stating facts and which were immaterial to the granting of an examination did not constitute "willful misrepresentation."

The case might be of particular value and importance in the future because of the clear definition given by the court as to the meaning of the word "willful" in penal statutes.

B. Counties—Boards of Supervisors

The Court continued to extend protection to members of Boards of Supervisors from personal liability for official acts where such acts are done in good faith and for a lawful purpose. The philosophy behind this may be found in *Vardaman v. McBee*,[8] which did not involve liability but wherein the Court, speaking through Justice L. A. Smith, upheld as a reasonable classification an act of the Mississippi legislature providing that counties could not fall below the classification they had in 1930 in determining pay of county officers. Judge Smith held in his opinion that the legislature was dealing with a subject of statewide importance and therefore the statute was not local and private, nor was it arbitrary and capricious in its classification since it was an effort to stabilize salaries and contribute to the efficiency of government by attracting capable men to the public service.

The Court has gone far in preventing members of Boards from being held personally liable for honest acts, no doubt under the well founded opinion that capable men will not take office at minor compensation if held personally liable for acts which may not be exactly in accordance with statutory direction but which are done in furtherance of the lawful purpose for which the Board is created. This was settled

---

[5]197 Miss. at 51, 19 So. (2d) at 445.
[6]21 So. (2d) 405 (Miss. 1946).
[7]Miss. Code Ann. (1942) § 8773.
[8]21 So. (2d) 661 (Miss. 1945).

in this state in *Paxton v. Baum*,[9] but suits have continued to be filed by certain state officers seeking personal recovery for acts protected by both court decisions and the positive declaration of the legislature that no liability shall attach to members of public boards acting under an opinion of the attorney general that an expenditure is lawful.[10] The Court has held to this principle in the cases of *Causey v. Jones*,[11] *Causey v. Gilbert*,[12] and *Barnett v. Woods*.[13] In the last-named case the Court also laid down the rule of statutory construction that where statutes conflict without repeal or amendment, they are to be construed so as to effectuate both statutes.

In *Costas v. Board of Supervisors of Lauderdale County*[14] the Court held that where a Board must make a final judicial determination as to the result of an election (in this case an election held on petition to outlaw sale of beer), an appeal lies from the date of the final determination and the entire matter including earlier determinations, judicial in nature regarding sufficiency of the petition, etc., is then before the Court.

In a later case of *Costas v. Board of Supervisors of Lauderdale County*[15] the Court held that everyone affected by the order of the Board, held on the previous appeal to include all the citizens of the County,[16] could enter a protest concerning the petition, and that before the Board had entered its final order determining the result of the election, the Board must give a hearing to all protestants. Such protest, it was held, could include any matters concerned with the conduct of the proceedings, even including sufficiency of the petition for election, on which the Board had made a judicial determination.

While the Court has been extending protection from personal liability to members of boards in matters where discretion and good faith is involved, it has been strict in requiring observance of statutory directions to such boards on matters not involving discretion on the part of the members thereof. It was held in *Brand v. Board of Supervisors of Newton County*[17] that an adjourned meeting, held on a day fixed by order of the Board on a day on which minutes were not signed as required by statute, was not a legal meeting and any action taken at such meeting

---

[9]59 Miss. 531 (1882).
[10]Miss. Code Ann. (1942) § 3842.
[11]193 Miss. 495, 10 So. (2d) 356 (1942).
[12]193 Miss. 756, 10 So. (2d) 451 (1942).
[13]196 Miss. 678, 18 So. (2d) 443 (1944).
[14]196 Miss. 104, 15 So. (2d) 365 (1943).
[15]22 So. (2d) 229 (Miss. 1945).
[16]196 Miss. 104, 15 So. (2d) 365 (1943), cited *supra* note 14.
[17]21 So. (2d) 579 (Miss. 1945).

was void. Such statutes the Court held to be mandatory and not directory.

A tax title resting upon a sale in 1931, wherein it was shown that minutes of the Board were not signed until a later meeting, was declared void in *Gardner v. Price*.[18] In this case the Court held that the minutes were valid when signed at a later meeting as to matters which the Board could pass upon at the later meeting, but invalid in matters in which time was of the essence. In this case time was of the essence as the minutes which were declard irregular were of the meeting which approved the assessment roll, which must be done at the August meeting.

In *Thompson v. Craig*[19] the Court held that parol testimony is competent to support an assessment although under former rulings of the court such testimony had been held invalid to attack assessments. This question was raised in *Gardner v. Price,*[20] but the Court did not pass upon it there for the reason that the minutes themselves showed they were not signed until the later meeting.

C. Courts

Carrying out the strict requirements for signing of minutes at the time fixed by statute, the Court in *Jackson v. Gordon*[21] held that failure of the judge of the circuit court to sign minutes during the term invalidated judgments rendered during the term. This ruling was reaffirmed in *Patton v. State*.[22]

D. Compensation, Commerce

In an action by an administrator against an employer following death of a nightwatchman, for overtime pay, damages and attorneys fees under the Fair Labor Standards Act, the Court held that a night watchman engaged in his occupation at a period when the plant was not in operation, although the plant was producing goods for shipment in interstate commerce, was not himself engaged in interstate commerce. Hence, the Court denied recovery of the overtime and penalties provided by the Fair Labor Standards Act. The opinion in this case is of interest as a review of federal decisions involving the Fair Labor Standards Act and also of the broadening definition of commerce which apparently is viewed with extreme disfavor by the Mississippi Court.[23]

---

[18]197 Miss. 831, 21 So. (2d) 1 (1945).
[19]196 Miss. 465, 17 So. (2d) 439 (1944).
[20]197 Miss. 831, 21 So. (2d) 1 (1945), cited *supra* note 18.
[21]194 Miss. 268, 11 So. (2d) 901 (1943).
[22]194 Miss. 757, 12 So. (2d) 383 (1943).
[23]Southern Package Corp. v. Walton, 194 Miss. 573, 11 So. (2d) 912 (1943).

This cause was appealed to the United States Supreme Court, which reversed the Mississippi decision.[24] When it again reached the Mississippi Court[25] that court limited recovery as much as possible under the United States Supreme Court ruling. It was held that while recovery for overtime compensation survived death of the employee, the liquidated damages and attorneys fees asked for were penal; hence recovery of such penalties was barred by the state statute of limitations for recovery of penalties,[26] the statutory period having elapsed prior to filing suit. The Court held that recovery of such penalties is governed by the law of the forum in which the recovery is sought.

In *First National Bank v. Miss. Unemployment Compensation Commission*[27] the Court held that a janitor, even when his employment requires skill, is performing a function ordinarily regarded as one of the household or an incident to business, and hence is an employee under the Fair Labor Standards Act, even "though arrayed in the livery of an independent contractor." The Court, it said, will look at the actual character of the employment.

E. Constitutional Law

A case of major importance and first impression in Mississippi was that of *City of Jackson v. McLeod*,[28] which was twice before the Court.[29] In this case the constitutionality of a municipal civil service law[30] was raised, as was also the right of a municipal civil service commission to approve discharge of policemen because of membership in a labor union.

On its first appearance before the Court it was held that where a statute provides for a trial by jury on appeal from an order from an inferior tribunal, it contemplates a trial *de novo* and a motion for a jury is not necessary. The Court also declared the statute providing for civil service was consistent with the constitution.

On its second appearance after retrial in the circuit court the Court held that membership by police in a labor union which requires an oath of allegiance to further the labor movement in general and the union in particular was a basis on which the municipal civil service commission

---

[24]320 U.S. 540, 64 S.Ct. 320, 88 L.Ed. 298 (1944).

[25]196 Miss. 786, 18 So. (2d) 458 (1944); *cert. denied*, 323 U.S. 762, 65 S.Ct. 93, 89 L.Ed. 609 (1944).

[26]Miss. Code Ann. (1942) § 731.

[27]23 So. (2d) 534 (Miss. 1945).

[28]24 So. (2d) 319 (Miss. 1946), cited *supra* note 4.

[29]This case is reported also as McLeod v. Civil Service Commission of Jackson, 21 So. (2d) 916 (Miss. 1945). Because a jury trial was denied the case was reversed for a new trial, and was decided on the merits in the second appeal.

[30]Miss. Laws 1944, c. 209.

could reasonably find such membership was an act tending to injure the public service, since policemen owe an entire duty to the public and must not favor any group.

The Court further held as a matter of interpretation that the council of a city in employing policemen and other municipal employees was acting in an executive or administrative capacity, and hence the legislature could not confer on the circuit court or any other judicial court authority to employ, appoint, or discharge city employees or to prescribe rules for such employees; and as it could not do so directly, it could not do so by the indirect device of an appeal. Thus the Court apparently answered the question as to power of a court to reverse a negative decision of a commission, raised by Justice Griffith in *Tri-State Transit Co. v. Dixie Greyhound Lines.*[31]

The Court quoted with approval a Pennsylvania case[32] as follows. "It is generally conceded that association with any organization which on any occasion for any purpose attempts to control the relations of members of either police or fire department toward the municipality they undertake to serve, is in the very nature of things inconsistent with the discipline which such employment imperatively requires and therefore must prove detrimental to the public welfare."[33]

However, it appears to be a logical inference from the several opinions in this case that whether such union membership is an act detrimental to the public service is a question of fact for the municipal board having jurisdiction and that such conclusion of fact will not be disturbed.

In laying down a rule for constitutional construction the Court held that in construing a constitutional provision, the Court will look to the dominant object to be accomplished by the provisions, rather than to a literal or technical interpretation.[34]

Of interest in reviewing the work of the Court on public law during the past four years are the so-called Jehovah's Witnesses cases,[35] in which the Court upheld the constitutionality of Chapter 178, Laws of 1942, a temporary war statute making a felony the dissemination of teach-

---

[31]197 Miss. 37, 19 So. (2d) 441 (1944), cited *supra* note 1.
[32]Hutchinson v. Magee, 278 Pa. 119, 122 A. 234 (1923).
[33]122 A. at 234.
[34]W. Horace Williams Co. v. Federal Credit Co., 21 So. (2d) 582 (Miss. 1945).
[35]Taylor v. State, 194 Miss. 1, 11 So. (2d) 663 (1943); Cummings v. State, 194 Miss. 59, 11 So. (2d) 683 (1943); Benoit v. State, 194 Miss. 74, 11 So. (2d) 689 (1943); Mills v. State, 194 Miss. 82, 11 So. (2d) 439 (1943). For an interesting discussion of this subject in Mississippi as well as holdings from other states and the United States Supreme Court, see Howerton, *Jehovah's Witnesses and the Federal Constitution* (1946) 17 Miss. L. J. 347.

ings designed to encourage violence, sabotage or disloyalty to the governments of the United States or of Mississippi. The Act was upheld solely as a war measure, the majority opinion admitting that they would not hesitate to declare it unconstitutional in peace time. Opinions in these cases were masterpieces of reasoning and well worthwhile reading as a text book on the right and abuse of free speech and freedom of religion in a republic. The cases are of no value as precedents in Mississippi as the appeal taken by Taylor, one of the defendants, to the Supreme Court of the United States found that court holding that the Mississippi Statute denies the liberty guaranteed by the Fourteenth Amendment to the Constitution of the United States.[36]

F. Elections

Several decisions were rendered by the Court construing the primary election laws of the state. *Simmons v. Crisler*[37] held that two sets of election officers, sitting at the same table and dividing the books alphabetically, may be used in a primary if each set of managers counts the ballots assisted by separate clerks, and the returns are certified to by the respective managers who received them.

But the Court held in *Briggs v. Gautier*[38] that while failure of election officers to take an oath before entering on their duties did not vitiate the election, the counting and calling of ballots for the precinct by two managers and their assistants in the main courtroom while the remaining ballots were called by the other manager and his assistant in the grand jury room rendered the election void. In the same case the Court held that failure of the election managers to require electors to sign their names on the receipt book before receiving ballots rendered the election void in that precinct. The Court also declared that when in some of the precincts the election is void and thrown out, the contestee will not be declared the nominee, but another primary must be offered.

G. Highway Department and Highways

Of major importance were a series of cases wherein counties sought repayment for money expended for road construction. The statute provides that when a county has constructed a paved highway which becomes a part of a continuous through highway, the State Highway Commission shall appraise the value of the county highway and pay the county the appraised value less depreciation, etc.[39]

---

[36]Taylor v. Mississippi, 319 U.S. 583, 63 S.Ct. 1200, 87 L.Ed. 1600 (1943).
[37]197 Miss. 547, 20 So. (2d) 85 (1944).
[38]195 Miss. 472, 15 So. (2d) 209 (1943).
[39]Miss. Code Ann. (1942) § 8036.

In *State* ex rel. *Cowan v. State Highway Commission*[40] and its companion case involving the same action,[41] it was held that the district attorney of the county in whose behalf a suit is brought is the proper relator, even though the county of proper venue is outside his district; and, conversely, the district attorney of the county of proper venue has no authority to bring a suit in behalf of a county lying outside his district. The Court distinguished these cases from *Capitol Stages v. State* ex rel. *Hewitt,*[42] in which it had been held that a district attorney could not institute proceedings to restrain a bus company from operating over roads of a county in his district, the proper relator in such cases being the attorney general. The rule was set out that where effects of the suit are statewide the proper relator is the attorney general, and where effects are local or applicable only to a particular district or parts of the district, the district attorney is a proper relator.[43] The Court further held that it is the duty of the Court to determine from the face of the proceedings the legal capacity of the district attorney to appear for the state and unless the district attorney had such authority the court is without jurisdiction.

While the question of capacity to institute such suits is interesting from the legal viewpoint, the importance of the decision in the above case lies in the possible ultimate effect on finances of the State Highway Commission and the road building program authorized by the legislature. The Court held that the reimbursement provided for in the statute[44] is not a gift within the meaning of the constitution; nor does the statute violate Section 170 of the Mississippi Constitution of 1890 limiting legislation to statutes for construction and maintenance of highways, the use of the words "construction" and "maintenance" having a broad enough construction to include the right to pay for a necessary link of roadway already completed. Lack of funds by the Highway Department, the Court held, could not be a bar to a mandamus ordering appraisal.

The same questions were back before the Court in *State Highway Commission v. McGowen, District Attorney,*[45] in which case it was held that a highway is "finally" located when its route and construction are adequate for present and normal traffic, and that in the statute the

---

[40]195 Miss. 657, 13 So. (2d) 614 (1943).

[41]State *ex rel.* Gillespie v. State Highway Commission, 195 Miss. 657, 13 So. (2d) 614 (1943).

[42]157 Miss. 576, 128 So. 759 (1930).

[43]See also Kennington-Saenger Theatres, Inc. v. State *ex rel.* District Attorney, 196 Miss. 841, 18 So. (2d) 483 (1944), discussed *infra* section M.

[44]Miss. Code Ann. (1942) § 8036.

[45]23 So. (2d) 893 (Miss. 1945).

use of the word "final" carried with it more the sense of "complete." An intention of the Commission to straighten or change portions of the road at a later date do not prevent the links now used from being part of the final location. It was decided by the Court that a highway is more than a mere right of way capped with pavement, but also a course of travel "so that occasional variations from time to time, throughout the extensive length thereof, would not erase the finality of the location."[46]

In overruling suggestion of error[47] the Court enlarged upon its previous opinion, explaining that while the order for mandamus is made under the statute requiring appraisal and payment, it does not include payment for the reason that the Commission does not have on hand or within prospect, without legislative aid, the sums needed to make payment; although the money is due, the provision for its payment is for the legislature and not for the courts.

In *Armstrong v. Itawamba County*[48] the Court set at rest the title to many public roads in holding that continued use by the public of a highway and the working of the road by the county without objection from freeholders for many years gives title to the highway by prescription or adverse possession.

A precedent which might at some time become of major importance in the matter of suits against public boards and commissions may have been set by the Court in *State Highway Commission v. Wunderlich*.[49] It was held that the State Highway Commission has been established as a body corporate, capitalized by the grant of funds; and its functions of maintaining and building highways together with its multiple privileges and responsibilities, regardless of whether they divest the Commission of such attributes of sovereignty as are alleged to adhere to it, operate to invest it with the character of a private corporation to the extent that it is subject to liability for all compensatory damages as a result of its breach of contract.

H. Municipalities

The constitutionality of a municipal ordinance requiring the closing of a store at eleven o'clock at night was before the Court in *Town of McCool v. Blaine*.[50] In holding the ordinance invalid, the Court said "the ordinance could only be sustained, if at all, by a clear necessity for abating a condition which disturbed the good order and peace of the municipality

---

[46] *Id.* at 897.
[47] 24 So. (2d) 330 (Miss. 1946).
[48] 195 Miss. 802, 16 So. (2d) 52 (1944).
[49] 194 Miss. 119, 11 So. (2d) 437 (1943).
[50] 194 Miss. 221, 11 So. (2d) 801 (1943).

to the extent that a regulation thereof has become reasonably necessary as an exercise of the police power. . . . If a statute purporting to have been enacted to protect the public health, the public morals or public safety has no real or substantial relation to these objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and therefore give effect to the constitution."[51]

That an ultra vires contract made by officers of a municipality does not estop the municipality was held in *Bishopric v. City of Jackson*,[52] "since all persons dealing with it are charged with knowledge of the law governing it and limiting the powers of its officers."[53]

I. Public Officers

In accordance with many other decisions affecting public officials, the Court in *Jones v. Seward*[54] held that there is a presumption, in absence of proof to the contrary, that an official performs his duty in the manner required by law. In *Barnett v. Lollar*[55] the Court ruled that a public officer is not liable for errors or mistakes made by him in good faith, when acting judicially or quasi-judicially within the subject matter over which he has been given jurisdiction; but there can be such an action, so clearly one that the officer could not do as to bar him from the justification that he did so in good faith and honest error.

That public officials are not required to determine the constitutionality of statutes before relying upon such statutes was decided in *Golden v. Thompson*.[56] While the Court in its opinion said that this holding is against the weight of authority over the nation, it took the view which seems to be the more clearly logical, saying that "whether a statute is constitutional or not is solemn judicial question for the courts to determine,"[57] and concluding that a public officer is not charged with the duty of determining the constitutional validity of a statute before acting in reliance thereon. No hardship or liability can be imposed on a public officer who in performance of duties has acted in good faith on the validity of a statute before its invalidity was judicially determined. But where a sheriff fails to give the proper notice of a sale as required by law he is guilty of conversion and the writ for sale does not afford him any protection, according to *Rigby v. Stone*.[58] If he had given

---

[51] *Id.* at 225, 11 So. (2d) at 802.
[52] 196 Miss. 720, 16 So. (2d) 776 (1944).
[53] *Id.* at 737, 16 So. (2d) at 778.
[54] 196 Miss. 446, 16 So. (2d) 619 (1944).
[55] 197 Miss. 574, 19 So. (2d) 748 (1944).
[56] 194 Miss. 241, 11 So. (2d) 906 (1943).
[57] *Id.* at 246, 11 So. (2d) at 907.
[58] 194 Miss. 775, 11 So. (2d) 823 (1943).

proper notice the writ would protect the sheriff if good on its face, even if prior procedings were irregular. The Court will not go behind the face of the writ to determine liability of an officer where there is no fault by the officer.[59]

In *Holmes County v. Ellis*[60] the Court refused to order a sheriff to return moneys paid to him by the Board of Supervisors, alleged to have been illegally paid, which were sought to be offset against a claim by the sheriff for money admittedly due. A *per curiam* opinion indicated a divergence of reasons existing among the members of the Court for its decision, but the case is worthy of note from Judge Griffith's castigation of Mississippi's system of paying sheriffs out of tax collection fees. Judge Griffith's arraignment of the system of compensation to sheriffs included the following strongly worded statement: "Illiberality of interpretation and administration with reference to these picayunish statutes (fees of sheriff as law enforcing officer) is but to invite the sheriff to attend to his tax collector's office and let the sheriff's duties ride upon an idle so far as can be excusably done. People complain about the laxity of the law's enforcement, but when they make up their minds to pay for law enforcement, specifically as such and not merely by way of tax collections, they will get law enforcement and in all probabality not before."[61]

A coroner is not a peace officer except under certain and temporary circumstances when the sheriff is displaced. Hence a writ addressed to any lawful officer cannot be served by him unless the special circumstances have occurred and he is temporarily serving as a peace officer.[62]

The definition of a public officer given in *Monette v. State*,[63] a case of long standing in Mississippi, was changed by the recent decision in *Glover v. City of Columbus*.[64] It was held that a public officer is a person appointed or elected to perform a designated duty concerning the public and the officer must have a continuing duty defined by rules prescribed by law, dischargeable by the officer in his own right. Hence a policeman who served the city only by permission of the mayor and council, the latter having prescribed his duties and supervised performance, was not a public officer under the constitutional provision so as to be entitled to hold over until expiration of term.

A specially concurring opinion in this case holds that Section 175 of the Constitution of Mississippi of 1890 has reference only to officers

---

[59]Rigby v. Whitten, 196 Miss. 661, 18 So. (2d) 152 (1944).
[60]195 Miss. 124, 13 So. (2d) 635 (1943).
[61]*Id.* at 140, 13 So. (2d) at 638.
[62]Millwood v. State, 23 So. (2d) 496 (Miss. 1945).
[63]91 Miss. 662, 44 So. 989 (1907).
[64]197 Miss. 467, 19 So. (2d) 756 (1944).

elected by the people or to the heads of departments appointed by the Governor and confirmed by the Senate, including members of boards and commissions so elected or appointed; and not to their subordinates regardless of name called.

J. Retirement Laws and Pensions

Vicksburg v. Crichlow[65] was a decision of importance in view of the possibility that pension systems for public employees will continue to expand. The Court held that the municipal Firemen's and Policemen's Retirement Act of 1940[66] does not contravene Section 93 of the Constitution of 1890, which prohibits the legislature from retiring any officer on pay or part pay, or from making any grant to such retiring officer. Nor does the act contravene Section 96 of the Constitution barring extra compensation. Nor is the statute contrary to Section 108 of the Constitution, which provides that when the legislature takes away duties pertaining to an office the salary shall cease. Neither are the retirement benefits gratuities. The *Crichlow* case apparently gives a complete bill of health to retirement acts as a matter of public policy for the improvement of governmental service.

K. Schools

The rule that one who erects improvements upon the lands of another, in the absence of estoppel or other equitable rights, has no right to remove them, except trade fixtures, applies to the lessee of school lands.[67]

In *Smith v. McCullen*[68] the words "Choctaw Purchase," as used in referring to the sixteenth section school lands in the Constitution of 1890, were held to refer to all sixteenth section lands in the state outside of the Chickasaw session. A history of the sixteenth section lands, possibly the most painstaking research yet undertaken regarding the legal features of those lands, is contained in the briefs of counsel and the opinion of the Court.

L. Statutes

Those who avail themselves of a legislative privilege of engaging in the sale of beer accept the privilege under the conditions attached to its exercise, the Court held in *Stone v. Farish*.[69] While a license may have aspects of property, conditions under which it is granted strip it

---

[65]196 Miss. 259, 16 So. (2d) 749 (1944).
[66]Miss. Code Ann. (1942) §§ 3471-3491.
[67]Smith v. Young, 24 So. (2d) 746 (Miss. 1946).
[68]195 Miss. 34, 13 So. (2d) 319 (1943).
[69]23 So. (2d) 911 (Miss. 1945).

of that quality which requires divestiture by judicial process only. Hence the Court upheld the constitutionality of a statute providing for the revocation of a permit to sell beer, saying that what the legislature may absolutely forbid, it may absolutely control.

In *Nelson v. City of Natchez*[70] the Court defined a public place as one wherein by general invitation members of the public attend for reasons of business, entertainment or the like, and are welcome so long as they conform to what is customarily there done. The Court held that it should take a reasonable and commonsense view of the evil at which a penal statute is directed and the protection it is designed to afford, and when these are within the letter of the statute the enactment is to be construed in accordance with its purpose, although the letter would admit a narrower interpretation.

To the same effect in statutory construction is *Quitman County v. Turner,*[71] holding that the history of a statute and its spirit should be taken into account and that a statute should be construed to avoid unthought of and unjust results. The consequences of a particular construction, whether good or bad, just or unjust, reasonable or unreasonable, should be considered in construing a statute.

M. Sunday Laws

An effort to use the anti-trust laws to aid in the enforcement of Sunday laws against picture shows occurred in *Kennington-Saenger Theatres, Inc. v. State* ex rel. *District Attorney.*[72] This action sought the forfeiture of a corporate franchise for alleged repeated violations of the Sunday prohibition against shows. The Court's decision was that since a corporate franchise gives authority to operate anywhere in the state, a suit to revoke the franchise is a statewide matter, and hence the attorney-general and not the district attorney is the proper relator to bring the suit in the name of the state.[73]

N. Zoning—County Wide

In *Frederic v. Board of Supervisors of Jackson County*[74] the Court apparently held that county zoning statutes in general are constitutional, conceding, without deciding, that they were valid. But the Court declared that there are limitations on the application of such restrictions to

---

[70]197 Miss. 26, 19 So. (2d) 747 (1944).
[71]196 Miss. 746, 18 So. (2d) 122 (1944).
[72]196 Miss. 841, 18 So. (2d) 483 (1944), cited *supra* note 43.
[73]See also Capitol Stages v. State *ex rel.* Hewitt, 157 Miss. 576, 128 So. 759 (1930), cited *supra* note 42; State *ex rel.* Cowan v. State Highway Commission, 195 Miss. 657, 13 So. (2d) 614 (1943), cited *supra* note 40.
[74]197 Miss. 293, 20 So. (2d) 92 (1944).

the use of property, holding that while a zoning law may be valid in general aspects, if when it is applied to a particular piece of property or area and a particular set of facts it is so arbitrary and unreasonable as to result in confiscation, it is void as applied to that purpose or area.

In this case the Court held that for a rural area to be validly restricted solely to residential purposes, the area must be a residential section, manifested by the actual presence of inhabitants, or must be land laid out particularly for that purpose with a plan to put it into use within a reasonably short time.

The above resume of the work of the Mississippi Supreme Court covers the period from September, 1942, through the March term, 1946. It has been confined solely to cases involving laws as applied to public bodies, boards, agencies, officials and commissions, exclusive of such laws as they apply to property. Nor has it included criminal law nor cases dealing with taxation, on which there have been several important and far reaching decisions. Research on this topic has been a pleasure; in viewing the work of the Court as a whole one recognizes with admiration the efforts of the justices to base decisions upon fundamental and underlying principles of reason which ideally must be synonymous with law.

VIII.

TAXATION

*Francis S. Bowling**

A. General Property Tax

The writer is indebted to Chancellor Lester Clark of the 10th Chancery District for his very able article on Tax Titles in Mississippi that appeared in a recent issue of the Law Journal.[1] We do not see how we can improve on his presentation of the subject to the lawyers of the State and, as he discussed fully the most important of the recent cases on Tax Sales and Titles, the writer shall omit this phase of the problem of Taxation and refer the reader to Chancellor Clark's article. However, several cases involving other phases of general property tax were before the Court during the period in question.

In *Ingalls Shipbuilding Corporation v. Board of Supervisors of Jackson County,*[2] the Court gave its interpretation of Section 19 of the

*Member American Bar Association and Mississippi and Hinds County Bars; Jackson, Mississippi.

[1]Clark, *Tax Titles in Mississippi* (1946) 17 Miss. L. J. 372.

[2]194 Miss. 299, 12 So. (2d) 521 (1943).

Balance Agriculture with Industry Act of 1936.[3] This section provides that all new factories and enterprises of public utility established under provisions of the Act shall be exempted from all ad valorem taxation on tangible property used in or necessary to the operation of the service or industry for a period of five years. The Court held that this Section applied not only to the properties owned by the factory or industry at the time the five-year period commenced, but also included all properties acquired by the industry during the five-year period. However, the Court made it plain that this subsequently acquired property in order to come within the exception must be used for purposes contemplated by the B.A.W.I. Act, that of enabling the natural resources and products of the State to be prepared for market herein, and of relieving unemployment. The Court indicated that any tangible property used in either expanding or operating the factory or industry during the five-year period would be exempted provided property was not acquired in such large amounts as to impair the revenue of the town or county.

In the absence of a statute there can be no personal liability for unpaid taxes against the individual's property. This principle has been strictly adhered to by our Courts, and further emphasized in *Vanzandt v. Town of Braxton,*[4] where the municipality brought action against an individual defendant for unpaid separate school district taxes on defendant's property, located within the school district. It appears that the Court made a very strict construction of Section 3122 of the Code of 1930[5] allowing recovery of unpaid taxes by direct action against property owners, in holding that the word "municipality" in the statute contemplated only those taxes used solely for municipal purposes to be included in this type of action for unpaid taxes, and could not include separate school district taxes. It was merely a construction of the language of the statute which, in this writer's opinion, could easily have been decided otherwise. However, the Court was confronted with the case of *Enochs v. State,*[6] which excluded inheritance tax under this statute before it was amended by the Legislature and the Court in the *Vanzandt* case was of the opinion that only the Legislature could include school district taxes in the statute.

The Court in this case did decide a question not raised before in this jurisdiction by holding that the municipality had the power to bring a suit of this nature on behalf of the trustees of the school district,

---

[3]Miss. Laws 1936 (First Ex. Sess.), c. 1.
[4]194 Miss. 863, 14 So. (2d) 222 (1943).
[5]Miss. Code Ann. (1942) § 9746.
[6]128 Miss. 361, 91 So. 20 (1922).

whether the property lay within or without the corporate limits, and held that the trustees had no power to take such action.

In *Chickasaw County v. G. M. & O. R. Co.*[7] we have another case of a tax statute being construed strictly in favor of the taxpayer and against the taxing power. The Board of Supervisors of Chickasaw County attempted to levy in addition to the 8 mills authorized by law a 5 mill and a 3 mill tax for the purposes of financing the Food Stamp Plan, as set up by the Federal Surplus Commodities Corporation of the Department of Agriculture. The Board attempted to levy the taxes under the authority of Chapter 144 of the Code of 1930[8] authorizing taxes as a pauper fund, and the Court held that what the Board here was attempting to do was not within the intent and purpose of the pauper fund, and, adhering to the principle of construing tax statutes very strictly, the Court held these levies in excess of the authorized 8 mill levy to be void. What we have here is merely another example of the Court saying that no taxes can be levied unless clearly authorized by statute.

Section 112 of the Constitution of 1890 protects property owners from having their property assessed at more than its actual value. Section 3191 of the Code of 1930[9] gives the Board of Supervisors the power to reduce the assessment in the event the property is assessed over its value and Section 3194 of the Code of 1930[10] provides that the action of the Board must be approved or disapproved by the State Tax Commission but does not give the taxpayer the right of a hearing before the commission or the right to produce evidence of the value of the property. In *Stuart v. Board of Supervisors*[11] the property owner, Stuart, brought his petition properly before the Board and proved that his property was assessed over its actual value and the Board approved a reduction in the assessment and forwarded a record of its action to the State Tax Commission. The Commission disapproved the Board's action without giving any reason and without giving the taxpayer an opportunity to produce evidence before the Commission. The County authorities then proceeded to demand and collect the taxes according to the original assessment and Stuart filed his bill in Chancery to enjoin the levy. In its majority opinion, the Court held that the action of the State Tax Commission was void because it did not allow the taxpayer to introduce evidence before the Commission as to the value of the land, and, in effect, the

---

[7]195 Miss. 754, 15 So. (2d) 348 (1943).
[8]Miss. Code Ann. (1942) § 7352.
[9]Miss. Code Ann. (1942) § 9815.
[10]Miss. Code Ann. (1942) § 9818.
[11]195 Miss. 1, 11 So. (2d) 212 (1943).

Court held that the statute requiring the Commission to approve or disapprove the reduction in assessment by the Board was also void. It is interesting to note that the Court declined to hold expressly that the statute[12] was unconstitutional but merely said that the result of the statute was void because the procedure in the statute was not sufficient to satisfy the rights of the taxpayer.

The Court then held that as the Commission's order was void, the Board's reduction of the assessment was in full force and effect and the Bill to enjoin the original assessment should have been sustained. Although the Court did not expressly state the reason for so approving the equity jurisdiction, the opinion held that Section 420 of the Code of 1930[13] applied and the county authorities were attempting to collect taxes "without authority of law" as the original assessment under which the tax authorities were acting was not in force. The writer is inclined to agree with one of the dissenting opinions to the effect that when the Commission refused to approve the action of the Board in reducing the assessment, it was the same as if no reduction had been given by the Board because the Board's reduction was conditioned on the Commission's approval, and therefore there was a final judgment by the Board from which the taxpayer had an adequate remedy by appeal to the Circuit Court as provided by statute. The majority opinion here seems to contradict the opinion in *Stone v. Kerr*[14] discussed under Section E of this review.

It is obvious that the opinion in the *Stuart* case will serve to limit the powers of the State Tax Commission as a reviewing authority. The majority opinion and the two strong dissenting opinions should result in much confusion as to this reviewing authority and as to the procedure open for the taxpayer in similar cases.

Although not dealing fully with the subject of taxation, it is believed that the practicing lawyer should be interested in the case of *Goosby v. Byrd*,[15] where the bill of complaint was filed in Chancery Court by a holder of a deed of trust to recover the amount of taxes paid by her on the property covered by the deed of trust and to have herself subrogated to the tax lien of the county and municipality and to enforce such lien. The complainant had paid the taxes for a number of years and it was admitted that the original debt was barred by the Statute of Limitations. A clause in the deed of trust provided that the holder of the indebted-

---

[12]Miss. Code Ann. (1942) § 9818.
[13]Miss. Code Ann. (1942) § 1340.
[14]194 Miss. 646, 10 So. (2d) 845 (1942).
[15]194 Miss. 568, 13 So. (2d) 33 (1943).

ness on the failure of the grantor under the deed of trust to pay the taxes could pay same and charge the amount as a part of the indebtedness. The Court held that because of this clause in the deed of trust the taxes paid by the holder of the indebtedness merely became a part of the original debt which gave the holder an adequate remedy, and, therefore, there was no necessity for subrogating her to the tax lien. This was merely a construction of the language of the deed of trust and the Court indicated that had the above clause not been in the deed of trust it would have held with the case of *Federal Land Bank of New Orleans v. Newsome,*[16] and would have allowed the complainant to be subrogated to the tax lien. The *Goosby* case should be kept in mind by attorneys while drawing their deeds of trust.

B. Franchise Tax

Section 3 of Chapter 121 of the Laws of 1934[17] imposes a franchise tax of $1.00 of each $1,000.00 or fraction thereof of the value of capital used, invested or employed within this state upon foreign corporations authorized to do business in this state. Our Court interprets the word "capital" as used in this section in its opinion in *State Tax Commission v. Mississippi Power & Light Company,*[18] where the Commission brought proceedings against the power company to impose an additional franchise tax for the years 1938, 1939, and 1940. The proceedings grew out of an item carried on the asset side of the company's ledger in the amount of several hundred thousand dollars listed as "unamortized debt discount and expense" growing out of a bond issue floated in New York several years before. This item represented the expense of such sale including discount and other incidental charges. The Court held that although this item was carried on the assets side of the ledger it did not represent capital, as contemplated by the statute, being carried thereon merely as a convenient bookkeeping method, and represented no actual value. The Court indicated that regardless of Section 7 of the Act[19] providing that the book value as shown by the records of the corporation shall be accepted as the true capital of the organization, the actual value as shown by the testimony is the determinative factor.

The statute imposing a franchise tax on foreign corporations doing business in this state was interpreted further in *Southern Package Cor-*

---

[16]175 Miss. 114, 161 So. 864 (1935).

[17]As amended by Miss. Laws 1940, c. 115, appears in Miss. Code Ann. (1942) § 9313.

[18]194 Miss. 260, 11 So. (2d) 828 (1943).

[19]Miss. Code Ann. (1942) § 9318.

poration v. State Tax Commission,[20] where the question was to decide whether an issue of Class B preferred stock by the foreign corporation should constitute "capital" under the language of the statute, and thereby be included in computing the franchise tax. This Class B preferred stock was issued by the corporation solely for the purpose of use in purchasing timber to be used in the corporation's mills, the stock to be preferred over all other and to receive annual dividends and to be retired at any time on payment of its par value. A retirement fund was set aside by the corporation to take up this stock. The corporation contended that this preferred stock was an evidence of indebtedness, creating between the corporation and holders the relation of debtor and creditor, and, therefore, did not constitute "capital" as contemplated by the statute. The Court held that the use of this word in the statute meant tangibles of the corporation, or the aggregate of its property and assets of all kinds and that the stock here in question was evidence of the corporation's right in the timber purchased by the stock, the timber being used in the corporation's business, and, therefore, evidences capital used, invested or employed within this State, and consequently, should be included in computing the franchise tax.

C. Unemployment Compensation Tax

In *Warren Brokerage Company v. Mississippi Unemployment Compensation Commission*[21] we find another interpretation of what constitutes an employer under the Unemployment Compensation Act.[22] The Court was confronted with two corporations, neither of which standing alone had a sufficient number of employees to come under the act, but computing their employees together as one employer a definite liability existed for the payment by the corporations of the unemployment compensation tax.

The controlling principle in the case was the fact that one of the corporations owned a majority of the stock of the other corporation, and, consequently, the two corporations constituted one employer under the act.

The companion case to the preceding case is *Warren Credit Corp. Inc., v. Miss. Unemployment Compensation Commission.*[23] The deciding point in both these cases is the language of the statute authorizing the unemployment compensation tax.

---

[20]195 Miss. 864, 15 So. (2d) 436 (1944), *sug. error overr.*, 195 Miss. 864, 874, 16 So. (2d) 856 (1944).
[21]194 Miss. 855, 13 So. (2d) 227 (1943).
[22]Miss. Code Ann. (1942) § 7440(h).
[23]194 Miss. 855, 13 So. (2d) 228 (1943).

D. Income Tax

In the next two cases we find the peculiar situation of our Court interpreting the language and meaning of a statute of another state. *Clement v. Stone*[24] and the companion case of the same title[25] deal with the exemption from income tax payment of a non-resident owner of property within this state. The complainant in these cases was a resident of Tennessee and owned a farm in Mississippi from which he derived a revenue. He contended that this income was exempted from the payment of income taxes to the State of Mississippi by virtue of Section 37 of Chapter 120 of the Laws of 1934,[26] providing that income received from property within this state owned by a non-resident shall be exempted if the State of which he is a citizen extends the same exemption to a citizen of this State. Without going into detail on provisions of the Tennessee statutes, it suffices to say that the first case interpreted the Tennessee statute to fall within the meaning of the exemption in the Mississippi statutes, and the latter case reversed this decision and held that the State of Tennessee had no general income tax law, so that the resident of Mississippi could acquire the same benefits in Tennessee that the complainant was attempting to acquire here. The purpose of the Mississippi statute is to prevent double taxation and it is clear that if the complainant was exempted here, then his income derived here would not be taxed at all. The Court in reversing its former opinion justified its action by discussing the principles that one who claims an exemption from taxation must show clearly that he comes within the exemption, which principle is the exception to the general rule that tax statutes are construed liberally in favor of the tax payer and against the taxing authority. It seems to the writer that in reality the Court determined that it had misconstrued the Tennessee statute in the first hearing of the case and that actually, the Tennessee statute did not come within the meaning of the exemption in the Mississippi statute, and if that decision stood, all residents of Tennessee owning property in Mississippi would not be subject to any form of income tax on such property. Holding otherwise would be very unfair and prejudicial to residents of this State.

The Memphis Natural Gas Company owned a gas pipe line running across the State of Mississippi, and from this pipe line at thirteen different municipalities the company sells gas wholesale to the Mississippi Power & Light Company, who, in turn, retails the gas to its customers. The

---

[24]195 Miss. 770, 13 So. (2d) 647 (1943).
[25]195 Miss. 774, 15 So. (2d) 517, 152 A.L.R. 742 (1943).
[26]As amended by Miss. Laws 1940, c. 124 and Miss. Laws 1944, c. 123, appears in Miss. Code Ann. (1942) § 9259.

State Tax Commission levied an income tax on the net income derived from this wholesale gas business in the State. In *State Tax Commission v. Memphis Natural Gas Company*[27] the Gas Company contended that the State could not levy a tax upon the net earnings of a foreign corporation attributable to its activities in this State and resulting from its ownership of propery in this state where the property is used exclusively in the furtherance of interstate business, and that a holding otherwise would violate the commerce clause of the Constitution. The Court, in approving the tax gave a lengthy and very interesting discussion on the difference between gross income and net income as a burden upon interstate commerce, and held with the majority of cases that the tax on the net income from property within the State used exclusively in interstate commerce was not a burden on interstate commerce to the extent of exercising power conferred by the Constitution upon Congress.

We can dispose of the contention by the gas company that state income tax laws were not intended to apply to foreign corporations doing an interstate business exclusively by saying that the Court decided that this type of income tax clearly was intended by the Legislature.

State Tax Commission v. Love Petroleum Co.[28] involves a statutory provision[29] that in case of mines, oil and gas wells, and other natural deposits, a reasonable allowance for depletion and for depreciation is allowed in the payment of income taxes. Originally, there were two domestic corporations owning and controlling the oil and gas leases and properties in question. The original cost of the properties to these corporations was approximately $26,000. A short time after the organization of the two domestic companies, the complainant in our case was chartered as a Delaware Corporation, and the two Mississippi corporations transferred and assigned to the Delaware Corporation all of their assets and the value of the gas wells and leases at that time was set at approximately $467,000. The life of the gas field was set at a certain time in the future, and, consequently, the depletion and depreciation under the income tax act up to that period would be the original cost of the property. The Delaware Corporation contended that this amount should be the cost to them and not the original cost to the two Mississippi Corporations. The Court held that the organizing and chartering of the Delaware Corporation was merely a re-organization of the two Mississippi Corporations, and, therefore, the cost figure to the two Mississippi Corporations and not the cost and value at the time of the re-

---

[27]197 Miss. 583, 19 So. (2d) 477 (1944).
[28]197 Miss. 277, 19 So. (2d) 923 (1944).
[29]Miss. Code Ann. (1942) § 9228 (8).

organization was the figure to be used in computing the depreciation and depletion in determining the deduction from income tax payments.

We find the same question presented in *Urschel v. Stone,*[30] where the complainant originally was president and a stockholder in a corporation owning gas and oil properties of a set value at the time the corporation was chartered. The corporation was then dissolved and all the assets became vested in the stockholders as tenants in common in proportion to their respective stock holdings. Of course, the value of the assets of the corporation at the time of the dissolution was much greater than at the time the corporation was chartered and the complainant contended that the cost of the assets in order to determine the depreciation under the income tax act was the value to him at the time he received the property from the dissolved corporation and not the value and cost to the corporation originally. The Court in effect held that the dissolution of the corporation was merely a device to increase the depletion and depreciation of the oil and gas properties and that the actual cost to the complainant was his share of the cost to the original corporation.

E. Taxpayer's Remedies

Stone, Chairman of State Tax Commission v. Kerr[31] involved the question of the right of a taxpayer to invoke equity jurisdiction by means of a bill for injunction against the taxing authority. We were confronted with this question in *Stuart v. Board of Supervisors* (discussed in section A, *supra*), where a property tax was involved, and as the *Kerr* case was decided before the *Stuart* case, it is hard to see how the Court reached its decision in the latter. The petitioner in the *Kerr* case sought an injunction against the Chairman of the State Tax Commission alleging that the latter was proceeding to enforce the collection of a privilege tax in excess of the amount authorized by statute. The Court was very strong in saying that equity would not take jurisdiction unless the taxpayer was without any form of remedy at law and that the petitioner, Kerr, had his recourse in the Circuit Court to recover his overpayment of taxes.

In *Gulf, Mobile & Ohio R. Co. v. Webster County*[32] we find the Court re-affirming its ruling that a taxpayer recovering an overpayment of taxes or taxes paid in error or under protest is not entitled to interest on the amount recovered.

---

[30]21 So. (2d) 466 (Miss. 1945).
[31]194 Miss. 646, 10 So. (2d) 845 (1942).
[32]194 Miss. 660, 13 So. (2d) 644 (1943).

F. Power of Tax Collector

Craig, State Tax Collector v. Stone, State Tax Commissioner, et al.,[33] affirms prior decisions of our Court to the effect that the State Tax Collector has only such powers as are expressly conferred upon him by statute and that he could not, by mandamus, compel the Tax Commissioner to assess privilege taxes on a pipe line within the State or to compel the Commissioner to ascertain the taxable units of the pipe line, which would, in effect, provide for the assessment. This power clearly had not been given the Tax Collector by statute and he was powerless to act until the tax was due.

IX.

TORTS

*David C. Welch**

During the period under consideration, only sixty-one cases of any consequence in the field of torts were decided by the Supreme Court.[1] Presumably, this reduction in the volume of case law in this field can be traced to two factors which the average practitioner will appreciate: there have been relatively few cases on the civil docket in our circuit courts throughout the state; and there has been a marked increase in title litigation as a result of the development of a new industry in this state—oil. As seems to have been the experience of others in times past in reviews of this type,[2] your reporter has had some difficulty in arranging the opinions into a definite outline. The outline adopted by a previous reporter will be utilized here insofar as possible.[3]

A. Negligence

In the case of *Mauney v. Gulf Refining Co.*[4] the Court, through Justice Griffith, gave a very useful and helpful discussion of the rule of "reasonable foreseeability" and it is to be anticipated that the opinion will become a landmark in our jurisprudence. The plaintiff and her hus-

---

[33]194 Miss. 767, 11 So. (2d) 433 (1943).

*Member American Bar Association and Mississippi and Jones County Bars; Laurel, Mississippi.

[1]1942-43 terms, 30 cases; 1943-44 terms, 9 cases; 1944-45 terms, 9 cases; 1945-46 terms, 13 cases.

[2]For previous reviews of torts cases in Mississippi, see 11 Miss. L. J. 76, 12 Miss. L. J. 123, 13 Miss. L. J. 86, 14 Miss. L. J. 82, and 15 Miss. L. J. 56.

[3]Butler, *Work of the Mississippi Supreme Court—Torts* (1940) 13 Miss. L. J. 86. Only a running commentary of the cases of importance is being undertaken here.

[4]193 Miss. 421, 9 So. (2d) 780 (1942).

band operated a café which was located diagonally across the street from a filling station operated by the defendant. The distance separating the two establishments was approximately fifty feet. While gasoline was being delivered to the local station from a tank motor car, a fire broke out. As might be expected under such circumstances, there was considerable pandemonium. In the resulting excitement the plaintiff turned to pick up her baby in the café and to run away from the expected danger. She fell over a misplaced chair and sustained a fall which resulted in an alleged miscarriage. The suit was commenced in chancery by attachment and the bill of complaint alleged that the fire was the proximate cause of the injury. The Chancellor dismissed the bill of complaint and his ruling was affirmed by the Supreme Court. While granting that this accident happened within the range of possibilities. the Court held that the actor was not bound to anticipate an extraordinary occurrence of this nature and pointed out the necessity of viewing the factual situation in prospect rather than in retrospect in tracing the chain of events from cause to *probable effect.* It was there said:

> The settled law in this state may be summarized in the form of a diagram, as follows: the area within which liability is imposed is that which is within the circle of reasonable foreseeability using the original point at which the negligent act was committed or became operative, and thence looking in every direction as the semidiameters of the circle, and those injuries which from this point could or should have been reasonably foreseen as something likely to happen, are within the field of liability, while those which, although foreseeable only as remote possibilities, those only slightly probable, are beyond and not within the circle,—in all of which time, place and circumstances play their respective and important parts.[5]

It is anticipated normally that a healthy nine-year old boy knows how to use a pair of roller skates. Such is not always the case.[6]. The defendant was engaged in the operation of a skating rink—a rather common establishment in the larger cities of this state. A youngster of nine years presented himself for admission to the rink and was fitted with a pair of skates for his use. The boy did not inform the defendant that he had never before tried this particular sport. The young fellow fell about fifty times and in one of the falls, the exact one not being determinable, was seriously injured. The plaintiff prevailed in the court below upon the theory that a reasonable degree of watchfulness on the part of the defendant would have disclosed the boy's inability to skate and the possibility of serious injury resulting therefrom. On appeal, the

[5] *Id.* at 428, 9 So. (2d) at 781.

[6] Blizzard v. Fitzsimmons, 193 Miss. 484, 10 So. (2d) 343 (1942), (1943) 15 Miss. L. J. 226.

judgment was reversed and one was rendered for the defendant. The Court was of the opinion that it would be necessary to resort to surmise and conjecture to determine which of the several falls produced the injury. There was dictum to the effect that the defendant was entitled to assume that the boy knew how to skate and was reasonably well able to take care of himself in that respect; and that if the defendant was to be held liable at all for injuries sustained by the boy resulting from a series of falls, liability could not attach until such time when a reasonable degree of watchfulness on the part of the defendant had disclosed the boy's inability to skate and the probability of consequent injury.

Another rather close factual situation was developed in the case of *Standard Oil Co. v. Henley*[7] where a young child lost its life from an explosion allegedly due to the negligence of the defendant in filling a kerosene container with gasoline. There was a verdict and judgment for the plaintiff, and it was reversed and remanded by the Court for a new trial as a majority of the Court felt that the verdict and judgment were against the great weight of the evidence.

Can a fourteen-year old boy agree with the driver of a tractor proceeding at night without lights to give the driver warning of any approaching danger from the rear? The Court answered negatively in the case of *Long v. Patterson* and it was there held that ". . . an infant cannot be held in tort for faults of omission when the duty to act otherwise must find its basis in an agreement by the infant."[8]

Two rather troublesome problems were presented to the court in the case of *Meador v. Hotel Grover*.[9] This was an action against the hotel company and its elevator operator for the death of a passenger resulting from the hotel company's alleged negligence in maintaining a defective elevator and in crushing the deceased's body between the edge of the elevator cage and the shaft wall. It was further alleged that there was willful and wanton negligence on the part of the operator of the elevator and that the defendant hotel had failed to furnish reasonable care for the treatment of the deceased's injuries. In the court below demurrers were sustained, the defendants having taken the position that the deceased had come to the defendant hotel for the purpose of illicit relationship with a "guest" of the hotel and, hence, was *in pari delicto* with defendants. The judgment was reversed with directions to proceed to trial on the merits.

---

[7]25 So. (2d) 400 (Miss. 1946). A similar result was reached in the case of Montgomery Ward & Co. v. Windham, 195 Miss. 848, 16 So. (2d) 622 (1944), *sug. error overr.*, 195 Miss. 848, 860, 17 So. (2d) 208 (1944).

[8]22 So. (2d) 490, 492 (Miss. 1945).

[9]193 Miss. 392, 9 So. (2d) 782 (1942).

In disposing of the question of the duty of the defendant hotel to furnish medical assistance the court said:

> It was the duty of the hotel company to use reasonable care to see that one injured on its premises and by the operation of its business receives prompt and proper care and treatment to the end that his injuries, however occasioned, may not be aggravated by unnecessary and avoidable delay or inattention. Such care must be commensurate with the facilities available to the party charged and with the needs of the party injured, and such duty is heightened once the injured party is taken in charge by the other.[10]

The defense of *ex dolo malo non oritur actio* was also rejected by the Court, in line with previous authorities,[11] on the ground that there was no causal connection between the alleged violation of law and the injury. To put it another way: "The injury must be traceable to his own breach of the law and such breach must be an integral and essential part of his case."[12]

A patron of a small moving picture theater did not see an usher immediately available and proceeded down the aisle to find a seat. The foot of another patron was protruding in the aisle and the plaintiff fell. The duty of care owed by such an operator to his patrons was discussed in the case of *Paramount Richards Theatres, Inc. v. Johnson*[13] wherein a verdict and judgment for plaintiff was reversed and rendered by the Supreme Court. It was there held that the operator need not furnish an usher for each patron and that, if the patron desires an usher, such patron must wait a reasonable time for such services to be made available. The appellate court pointed out that it was a matter of common knowledge that a theater must be in semi-darkness and that a moving picture exhibitor has the duty, as respects degree of lighting provided during exhibitions, to conform in a fair and reasonable measure to the standards ordinarily and generally maintained by those engaged in operating establishments of a *similar* size and character in a sizable area or a considerable section of the country.

A seller filed a message with the defendant telegraph company addressed to a member of seller's firm for the purpose of having him pro-

---

[10] *Id.* at 403, 9 So. (2d) at 785.

[11] *E.g.*, Whitley v. Holmes, 164 Miss. 423, 144 So. 48 (1932). *But cf.* Western Union Tel. Co. v. McLaurin, 108 Miss. 273, 278, 66 So. 739, 740 (1914), wherein it was said: "If a plaintiff cannot open his case without showing that he has broken the law, a court will not aid him. . . . The principle of public policy is that no court will lend its aid to a party who grounds his action upon an immoral or illegal act." See note 14 *infra*.

[12] Meador v. Hotel Grover, 193 Miss. 392, 405, 9 So. (2d) 782, 785 (1942).

[13] 25 So. (2d) 129 (Miss. 1946). See also Daniel v. Jackson Infirmary, 173 Miss. 832, 163 So. 447 (1935).

cure a hedging contract to protect the seller-sender against any rise in price of the commodity concerned and the defendant company failed to transmit the message promptly. Recovery was denied on the ground that the seller-sender would have to rely upon the hedging contract to establish his damages.[14]

Plaintiff's intestate was employed by the state highway department in making a sub-soil survey. In making the survey the deceased was using a long auger to make his tests. The tests were being made on the defendant company's right-of-way and an uninsulated power line was there located about thirteen and one-half feet in the air. While extracting the auger it came in contact with the uninsulated power line and instant death resulted. In the lower court there was a peremptory instruction for the defendants and, on appeal, the judgment was affirmed.[15] The court ruled that the deceased was no more than a licensee to whom the defendant owed the duty to refrain from willfully or wantonly injuring and that in this case there was no violation by the defendants of their duty to deceased.

Artificial light and heat are now used to a large extent, where available, in raising chickens. The plaintiff failed to pay a past due bill and the defendant power company discontinued furnishing power, a right reserved to it in its contract with the consumer. The plaintiff's request for a mandatory injunction and damages was denied.[16]

B. Master and Servant

(1) Master's liability for injuries to servant

The degree of care which a master owes to his servant has been variously stated in previous decisions of the Court. Several interesting cases touching on this particular problem were decided by the Court during the period here under consideration. In the case of *Stewart v. Kroger Grocery etc. Co.*[17] the plaintiff was employed as a butcher in

---

[14]Capps v. Postal Telegraph-Cable Co., 197 Miss. 118, 19 So. (2nd) 491 (1944). Certain futures contracts are "null and void and unenforceable." Miss. Code Ann. (1942) § 28. The Court distinguished this case from the *Meador case* (see notes 10, 11, 12 *supra*) in that in the latter the illegality was not an essential part of the plaintiff's case.

[15]Roberts v. Miss. Power & Light Co., 193 Miss. 627, 10 So. (2d) 542 (1942). Compare: Burch v. Southern Bell Tel & Tel. Co., 178 Miss. 407, 173 So. 300 (1937), and Miss. Power & Light Co. v. Goosby, 187 Miss. 790, 192 So. 453 (1939). *See* 18 Am. Jur. 491-493.

[16]Capital Electric Power Ass'n. v. Franks, 23 So. (2d) 922 (Miss. 1945). For another negligence action in Chancery Court, see Fraser v. Hill, 12 So. (2d) 161 (Miss. 1943), wherein complainant in an Attachment in Chancery recovered damages for death of cattle allegedly resulting from lead poisoning.

[17]21 So. (2d) 912 (Miss. 1945). Compare: Miss. City Lines v. Bullock, 194 Miss. 630, 13 So. (2d) 34, 145 A.L.R. 1199 (1943).

defendant's store. There was a storeroom in the rear of the store and access thereto was through a swinging door. Just behind this door and hanging from the same facing on which the door swung was a sack containing dirty linen. In passing through this door with a box containing merchandise the plaintiff sustained an injury allegedly because the door could not swing completely open. The plaintiff urged that the defendant-master had failed to furnish and maintain safe instrumentalities with which to work. There was a directed verdict for the master and this ruling was affirmed on appeal. The Court there held that it was not the duty of the employer-master to furnish and maintain perfect appliances, or even the best and the safest, nor is he obliged to exercise the highest degree of care to avoid injuries. Here the employee failed to use the instrumentalities in the proper and normal manner and the sack filled with dirty linen was but a remote cause of the injury. It was there said:

> His [master's] obligation is to use reasonable care, and what is reasonable care is largely determined in each case by the nature, condition and extent of the danger of the instrumentalities furnished to and maintained for a servant in his work, and the greater or lesser the danger the greater or lesser is the degree of care which must be taken.[18]

An evenly divided court approved a judgment for the plaintiff in a case similar in large measure to the case just discussed.[19] There the servant was seeking to recover for injuries resulting from a fall received when attempting to reach an article of merchandise on the top shelf in the defendant's store. There was some question as to whether the employee used a box or stepped on a shelf opposite from the shelf on which the merchandise was located. The Court held that the employer would have to show that it furnished a box for the employee to stand on and that the box was readily accessible and available, or that the employer had no knowledge of the practice of its servants in using the opposite shelf as a step.

A public utility corporation is charged with the duty to handle and control the dangerous instrumentality of electricity with the highest degree of care which skill and foresight can make possible. This duty is absolute and cannot be delegated to a fellow-servant (foreman) and no relief can be found in the proposition that the servant knows as much

---

[18]21 So. (2d) 912, 913 (Miss. 1945); *accord,* Wilkie v. West Const. Co. of Tenn., Inc., 196 Miss. 233, 16 So. (2d) 154 (1944), *sug. error overr.*, 196 Miss. 233, 246, 16 So. (2d) 617 (1944), and Masonite Corp. v. Graham, 25 So. (2d) 322 (Miss. 1946). *Cf.* Odom v. Walker, 193 Miss. 862, 11 So. (2d) 452 (1943).

[19]F. W. Woolworth Co. v. Freeman, 193 Miss. 838, 11 So. (2d) 447 (1943).

about the instrumentality and its dangers as does the power company.[20]

(2) Master's liability for servant's injuries to third persons

Cases in this particular field are arising continually to be challenged anew. Where does "agency" stop and the field of the "independent contractor" begin? One of the more interesting cases in this field was that of *Sears, Roebuck & Co. v. Creekmore*.[21] The plaintiff purchased a covering for his kitchen floor from the defendant and the latter was to make the installation. The regular employee assigned to work of this nature was away and the defendant employed another, allegedly an expert, to make the installation. This substitute advised the plaintiff that it would be necessary to have some heat in the kitchen in order to properly mould the linoleum. Additionally, it was learned that a much more satisfactory job could be accomplished if the stove was moved. In the evidence there was quite a bit of dispute as to the assistance rendered by the plaintiff in this operation. The gas running to the stove was not cut off and there soon was a fire of such proportion that the entire home and its furnishings were destroyed completely. The court held that an agency had been created between the defendant company and the substitute, and not a relationship of independent contractor; and that the substitute acted within the course of his employment, and that the act creating the loss was incidental to the authorized conduct even though the substitute was not employed to move stoves. In passing thereon the court stated:

> In disconnecting the gas pipes, he had not abandoned his employment and gone about some purpose of his own. . . . Thus is emphasized that this temporary digression was not an end but a means, and the acts pursued in removing it [the stove] from the course required by his employment did not carry him outside that restricted zone of responsibility referred to as the "scope of his employment."[22]

---

[20]Miss. Power & Light Co. v. Merritt, 194 Miss. 794, 12 So. (2d) 527 (1943). In concurring opinion it was there said: "The master's duty to abate threatened danger is as great as his duty not to create it." This case is limited to situations wherein an extension of service is being made. In that event power company has duty of de-energizing wire by turning off at the switch or requiring their linemen to insulate the wire with a rubber blanket. On the question of non-delegable duty see: Masonite Corp. v. Lochridge, 163 Miss. 364, 140 So. 223 (1932), *sug. error overr.*, 163 Miss. 364, 382, 141 So. 758 (1932).

[21]23 So. (2d) 250 (Miss. 1945).

[22]*Id.* at 252, 253. Three of the justices were of the opinion that there was no liability and one remarked: "Certainly, in my judgment, this hazardous operation was not incidental to the laying of the linoleum." Barmore v. Vicksburg, S. & P. R. Co., 85 Miss. 426, 38 So. 210, 70 L.R.A. 627, 3 Ann. Cas. 594 (1905) and Loper v. Yazoo & M. V. R. Co., 166 Miss. 79, 145 So. 743 (1933) were relied upon in the prevailing opinion The dissenting opinion found its authority in the cases of Davis v. Price, 133 Miss. 236, 97 So. 557 (1923) and Shell Petroleum Corp. v. Kennedy, 167 Miss. 305, 141 So. 335 (1932).

A was employed by B as a cost clerk. Over the week-end A took some of his work home for further compilation and this was done in pursuance to instructions from his superiors. On the way home, A ran into C with his automobile. C sued B on the theory that he sustained his injury while A was acting within the "scope of his employment." This theory was rejected by the Court and the holding was to the effect that for the conduct of the employee to come within the "scope of his employment," the servant must be actuated by a purpose of serving the master's business and that it must be more than merely technical, suppositional or argumentative.[23]

A somewhat closer factual situation was found in the case of *Stovall v. Jepson.*[24] The employee was in the process of making delivery of newspapers for his master. At the time of the accident, his duty required him to be traveling in a southerly direction. The plaintiff was traveling in a southerly direction and met a transport truck going in the opposite direction. Negligence was predicated on the theory that the servant of the defendant was traveling north, and attempted to pass the transport truck and that the plaintiff, in consequence, ran into the transport truck and suffered personal injuries. The servant testified that he was going in a southerly direction and that when he heard the crash he turned his automobile around and took up a position just to the rear of the transport truck. The Court held that the defendant was entitled to a directed verdict and that, even if the accident had happened in the manner alleged by the plaintiff, the servant would have stepped aside from his master's business for some purpose of his own disconnected with his employment and that the relationship of master and servant would have been thereby temporarily suspended and the master not liable for the acts of his servant during such period of deviation.[25]

Another example of a case wherein there was a failure to show that an employee was acting within the scope of his employment was *Gab-*

[23]S. & W. Construction Co. v. Bugge, 194 Miss. 822, 13 So. (2d) 645 (1943).
[24]195 Miss. 115, 13 So. (2d) 229 (1943).
[25]The leading case in this state on deviation from the course of employment is Barmore v. Vicksburg S. & P. R. Co., 85 Miss. 426, 38 So. 210 (1905), referred to *supra,* note 22, wherein it was held: "In determining whether a particular act is committed by a servant within the scope of his employment, the decisive question is not whether the servant was acting in accordance with the instructions of the master, but, was he at the time doing any act in furtherance of his master's business? . . . Even if in violation of express orders, a deviation from, is not an abandonment of, the master's service." See also: Thomas v. Hively, 196 Miss. 187, 16 So. (2d) 632 (1944), *infra* note 35; McLaurin v. McLaurin Furniture Co., 166 Miss. 180, 146 So. 877 (1933); Brown v. Bond, 190 Miss. 774, 1 So. (2d) 794 (1941); and Bourgeois v. Miss. School Supply Co., 152 So. 642 (Miss. 1934), *sug. error sus.*, 170 Miss. 310, 155 So. 209 (1934). *Cf.* Trico Coffee Co. v. Clemens, 168 Miss. 748, 151 So. 175 (1933) (wilfull and wanton wrong); So. Bell Tel. & Tel. Co. v. Quick, 167 Miss. 438, 149 So. 107 (1933) (mere deviation and no departure).

bert v. Treadaway.[26] In the cited case, a farm manager was engaged in assigning to tenants their respective land allotments. This manager furnished one of the tenants a match with which to start a grass fire which spread to the plaintiff's land and caused damage. The Court held that there was a failure to show that the burning of the grass was incidental to and within the scope of the duties of the manager, and that there was no substantial evidence from which a jury could have found that the manager was, in respect to the act causing damage, acting within the scope of his employment and in furtherance of his employer's business.

C. Automobiles

We have discussed heretofore some of the cases wherein a defendant seeks to avoid a judgment by plea that the plaintiff or plaintiff's intestate was *in pari delicto* with the defendant.[27] This defense was found to be a complete bar in a recent case.[28] In this case there was a loaded trailer being hauled by the deceased as a city employee to the fair grounds in Jackson. In violation of a statute,[29] the trailer was not equipped with brakes and this fact was known to the deceased and to his superior who was directing the movement. Since the injuries which caused the death of the plaintiff's husband resulted from the fact that the trailer did not have any brakes, the city and the deceased were held to be *in pari delicto*.

A municipality was concerned in another case wherein its liability, under the factual situation, was approved.[30] Here the plaintiff alleged that the city failed to give adequate warning of a dirt and concrete barricade extending approximately twenty-four feet into a street from the side thereof on the right-hand side of oncoming traffic. The issue of fact made by the evidence was whether or not the barricade should have been and was guarded properly by a red light or otherwise to prevent collision. The city took the position that the plaintiff was not using reasonable care and that, therefore, the city owed him no duty. This defense was rejected and the court held the city to the standard of care which had been set out in *City of Greenville v. Laury*.[31] In arriving at the initial negligence of the city it is not necessary to look to the plain-

---

[26]194 Miss. 435, 13 So. (2d) 157 (1943). See also Metzger v. Sessions, 23 So. (2d) 746 (Miss. 1945) (damage for removal of timber).

[27]See notes 12, 13 and 15, *supra*.

[28]Downing v. City of Jackson, 24 So. (2d) 661 (Miss. 1946).

[29]Miss. Code Ann. (1942) § 8249(a)3.

[30]City of Meridian v. King, 194 Miss. 162, 11 So. (2d) 205 (1942), *sug. error overr.*, 194 Miss. 162, 175, 11 So. (2d) 830 (1943).

[31]172 Miss. 118, 159 So. 121 (1935). *Cf.* Birdsong v. City of Clarksdale, 191 Miss. 532, 3 So. (2d) 827 (1941), where the plaintiff's negligence constituted the sole proximate cause of the accident.

tiff's conduct for it is not a factor in determining the initial negligence of the municipality. The court expressed it in the following language:

> The city's negligence is not appraised with reference to the particular plaintiff nor the particular accident; it is determined initially with reference solely to the standard of care as defined in the principle. If the city is negligent by its conduct the plaintiff's negligence becomes contributory; if the city is not negligent by the abstract test the injury is due solely to negligence of the plaintiff.[32]

The general rule as to a municipality may thus be stated: a city must exercise reasonable care to keep its streets in reasonably safe condition for their accustomed use in their accustomed manner.

The act of stopping an automobile at night on the paved portion of a highway at the very entrance to a bridge to lend assistance to a pedestrian who is apparently in distress is a violation of the statute[33] and will constitute actionable negligence where there is a showing that the traveler could have stopped his automobile on the shoulder of the highway before entering the bridge.[34]

An employer authorized his employee to find someone to go with the employee on a trip for the employer. The employee induced two persons to make the trip with him and, before starting on the trip, so reported to his employer. Thereafter, however, the employee picked up still another friend who was later injured in an accident. Should the employer be held liable in a case of this nature? Was the last invited person a "guest" of the employer? These questions were answered in the negative by the Court in the case of *Thomas v. Hively*.[35] The Court held that a directed verdict should have been given to the employer on the theory that the employee's authority to invite other persons was at an end after he reported to his employer that he was ready to start the trip and the plaintiff, subsequently invited, was the guest of the employee and not of employer.

The Alabama guest statute was applied by the Court in the case of *Covington v. Carley*.[36] While driving in Alabama the operator of the automobile went to sleep at the wheel and the plaintiff suffered injuries as a result. The Court set out that the purpose of the Alabama Guest statute was to deny recovery to a non-paying guest as against the operator of an automobile except in cases of willful or wanton misconduct. The

---

[32]194 Miss. 162, 178, 11 So. (2d) 830, 831 (1942).
[33]Miss. Code Ann. (1942) § 8215.
[34]Gulf Refining Co. v. Brown, 196 Miss. 131, 16 So. (2d) 765 (1944).
[35]196 Miss. 187, 16 So. (2d) 632 (1944).
[36]197 Miss. 535, 19 So. (2d) 817 (1944).

Court was of the opinion that falling asleep at the wheel did not make out a sufficient case of "wanton misconduct" to take the issue to the jury. However, the court indicated that a different result would follow if the driver had any reason to anticipate that he would or might fall asleep.

The Court has maintained its position as to damages resulting from automobile accidents. If the award is considered excessive, the Court will either remand as to damages alone[37] or will order a remittitur.[38]

D. Railroads

In two recent cases the Court has reaffirmed and applied the doctrine of the case of *G. M. & N. R. Co. v. Holifield*.[39] In the absence of unusual conditions, a railroad may leave a train standing over a public crossing during the day or at night without any light or warning to the traveling public. The mere presence of railroad cars on a crossing is all the warning that the traveling public can expect. Heavy fog is not such an unusual condition as to prevent the application of this rule.[40]

There was only one case in this field based on the Federal Employers' Liability Act[41] wherein the assumption of risk doctrine was applied.[42] Here a part of the train was left on the main line near a switch but there wasn't sufficient clearance for a person to pass the end of the stationary cars while riding on a car being backed from the main line. The deceased was serving as a brakeman. An employee on the moving car cautioned the engineer within forty feet of the moving car and had given an emergency stop signal but there was no outcry. The court held that the deceased "assumed the risk" and that the railroad defendant was not negligent because the employee had only sufficient time to signal the engineer and that an outcry from such employee would not have served any useful purpose.

The railroads are constantly harrassed by weeds growing along their right-of-way. In one instance they used an arsenic compound and

---

[37]Clary v. Breyer, 194 Miss. 612, 13 So. (2d) 633 (1943).

[38]Standard Oil Co. v. Crane, 23 So. (2d) 297 (Miss. 1945). In order to recover for physical pain and mental anguish it is necessary to present substantial evidence that the deceased retained consciousness after the accident.

[39]152 Miss. 674, 120 So. 750 (1929).

[40]Miss. Export R. Co. v. Summers, 194 Miss. 179, 11 So. (2d) 429 (1943), *sug. error overr.*, 194 Miss. 179, 193, 11 So. (2d) 905 (1943). The other case was that of Ill. Central R. Co. v. Houston, 194 Miss. 607, 9 So. (2d) 788 (1942). See also G. M. & N. R. Co. v. Addkison, 189 Miss. 301, 194 So. 593 (1940). For a discussion of the bell and whistle statute, Miss. Code Ann. (1942) § 7777, see: N. O. & N. E. R. Co. v. Miles, 197 Miss. 846, 20 So. (2d) 657 (1945). *Cf.* N. O. & N. E. R. Co v Burge, 191 Miss 303, 2 So. (2d) 825 (1941).

[41]45 U.S.C.A. § 51 *et seq.*

[42]Kurn v. Denson, 193 Miss. 763, 10 So. (2d) 198 (1942).

sprayed this along their right-of-way. After a rain, a portion of the poison was washed into an adjoining cattle pasture and the plaintiff's cattle drank from the puddle. The first time that this case was before the court it was held that the question was one for the jury.[43] However, on subsequent appeal,[44] the Court applied the area of liability doctrine heretofore discussed,[45] and recovery was denied.

E. Carriers

Among other things, in part, the Uniform Highway Traffic Regulation Act provides:

> (a) Upon any highway outside of a business or residence district no person shall stop, park, or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled part of the highway when it is practical to stop, park, or so leave such vehicle off such part of said highway, but in every event a clear and unobstructed width of at least twenty feet of such part of the highway opposite such standing vehicle shall be left for the free passage of other vehicles and a clear view of such stopped vehicle be available from a distance of two hundred feet in each direction upon such highway.
>
> (b) This section shall not apply to the driver of any vehicle which is disabled while on the paved or improved or main traveled portion of a highway in such manner and to such extent that it is impossible to avoid stopping and temporarily leaving such disabled vehicle in such position.[46]

In the case of *Teche Lines, Inc. v. Danforth*[47] the highway itself was only twenty feet wide and there was three and a half feet of shoulder on each side, making a total width of twenty-seven feet. The stop was made by the bus about halfway down an incline approximately eleven hundred feet long. The bus was about eight feet wide so that when some room was left to the passengers to alight on the shoulder and not in the ditch it was impossible to leave twenty feet clearance opposite the bus. While the bus was discharging a passenger, the plaintiff's decedent ran into the rear of the bus and as a result died from the injury.

In the lower court the following instruction was granted to the plaintiff and the granting of this instruction was assigned as error on appeal:

---

[43]Ill. Central R. Co. v. Wright, 11 So. (2d) 312 (Miss. 1943).
[44]Wright v. Ill.. Central R. Co., 196 Miss. 150, 16 So. (2d) 381 (1944).
[45]See notes 4 and 5, *supra*.
[46]Miss. Code Ann. (1942) § 8215.
[47]195 Miss. 226, 12 So. (2d) 784 (1943).

> The Court instructs the jury for the plaintiffs that if you believe from the testimony in the case, that the bus of the defendant was stopped upon the paved or improved or main traveled part of Highway 11, not in an emergency, at a place and time and in such a way as not to leave a clear and unobstructed width of at least twenty feet of such part of the highway opposite such standing bus or vehicle, then such stopping of said bus or vehicle at such time and place, and under such condition, if you believe it was so parked, was a violation of the law and negligence . . .[48]

A majority of the Court held that the quoted instruction amounted to a peremptory charge for plaintiff as it, in effect, told the jury that if less than twenty feet clearance was left by the bus, this was negligence. The Court further held that the right to operate on the highway includes the right to stop on the way, temporarily, for a legitimate or necessary purpose when that purpose is an immediate incident to travel. The Court granted that the police power of a state is broad but that with respect to the statute here involved a literal construction would render the statute unconstitutional as an arbitrary and unwarranted interference with, or unreasonable restriction on, those rights of the citizens which are fundamental. Though there were two Justices dissenting,[49] the majority opinion, by judicial construction, reached a workable and sensible result. It was expressed in the words of the Court as follows:

> Our ruling is that when twenty feet of clearance is impossible, the vehicle shall turn as far to the right as practical including sound and safe shoulders, but must not stop upon any part of the traveled highway unless and until at least 200 feet clear view is available in each direction from the point where the stop is made . . . and that all this is for the determination of the jury, instead of being taken away from them, as was done here.[50]

What is the duty of a bus driver after he stops and furnishes the passenger with a safe place to be discharged? A twelve year old boy alighted from a bus and was struck by an automobile while attempting to run across the highway to the rear of the bus. The Court held that even though the bus blocked a part of the highway in violation of the statute discussed in connection with the *Danforth* case, *supra,* the violation was not the proximate cause of the injury. The Court said that the bus driver did not owe the boy the duty of warning him of the danger of approaching vehicles on the traveled portion of the highway

---

[48] *Id.* at 248, 12 So. (2d) at 785.

[49] Justice Anderson was of the opinion that it was a valid exercise of the police power. Chief Justice Smith was of the opinion that the statute was plain and unambiguous and needed no judicial construction.

[50] 195 Miss. 226, 255, 12 So. (2d) 784, 788 (1943).

and that, in view of the independent and intervening cause, the original negligence of the defendant bus was too remote and was nonactionable.[51]

In *Parker v. Film Transit Co.*[52] defendant common carrier was engaged in the business of delivering motion picture films. In an emergency the defendant, for an agreed compensation, secured the services of a theater operator to deliver some film in a town near his home. Despite the agreement by the theater operator to make personal delivery, when he reached his home, he secured the services of a third person to complete the delivery. This third person used her own automobile and negligently ran into the plaintiff. The court, lower and appellate, denied recovery and held that, regardless of whether the theater operator was an agent or an independent contractor, the carrier would not be responsible for the torts of a substitute employed by the theater operator who had neither express nor implied authority to select a substitute. It was a responsibility that the carrier could delegate to another.[53]

F. Trespass

(1) To the person of another

Mere words, however provoking or insulting they may be, do not constitute an "assault" unless there is an actual offer of physical violence.[54]

Railway companies employ their own patrolmen for the purpose of protecting railroad property. The case of *Jefferson v. Yazoo & M. V. R. Co.*[55] presents some rather difficult problems in this field. The defendant railroad was losing coal and sent one of its patrolmen, together with a deputy sheriff, to the scene of one of its coaling stations. There the patrolman and the deputy sheriff found deceased coming away from the coaling station with what appeared to be a sack full of coal. It was necessary for the patrolman to leave railroad property to apprehend deceased. He was apprehended and subsequently there was a struggle between deceased and the patrolman, five shots were fired, and the alleged

---

[51]Miss. City Lines, Inc. v. Bullock, 194 Miss. 630, 13 So. (2d) 34, 145 A.L.R. 1199 (1943); *cf.* Bufkin v. L. & N. R. Co., 161 Miss. 594, 137 So. 517 (1931). The inquiry should be: do the facts constitute a succession of events so linked together as to make a *natural* whole, or was there some new and independent cause intervening between the alleged wrong and the injury?

[52]194 Miss. 542, 13 So. (2d) 159 (1943).

[53]As might be expected, bus drivers apparently are still having trouble with passengers and wrongful ejectment suits, etc. are not uncommon; *e.g.*, Blanton v. Tri-State Transit Co. of La., 194 Miss. 393, 12 So. (2d) 429 (1943) and Tri-State Transit Co. of La. v. Worley, 197 Miss. 663, 20 So. (2d) 477 (1945).

[54]Nowell v. Henry, 194 Miss. 310, 12 So. (2d) 540 (1943).

[55]194 Miss. 729, 11 So. (2d) 442 (1943), and on second appeal at 195 Miss. 450, 15 So. (2d) 681 (1943).

thief was dead. Investigation, however, disclosed that the fatal shot entered the right side in the back of the decedent and ranged downward. The defense interposed was that of self-defense. The first trial resulted in a directed verdict for the defendants. On appeal, the Supreme Court reversed and remanded on the theory that just because the patrolman had gone beyond the railroad premises in apprehending the deceased did not exonerate the railroad from liability for any homicide committed by its patrolman. A second trial was had resulting in a verdict and judgment for the defendant. On appeal, this too was reversed and the rule of self-defense in cases of this nature was stated by the Court as:

> The slayer must have believed, and had good reason for believing, at the time he kills another that he is then in danger of losing his own life or sustaining great bodily harm at the hands of the deceased, and he is not justified in slaying his adversary because he may anticipate a further attack unless he leaves the scene of the difficulty.[56]

(2) To the property of another

In *Griefield v. Gibraltar Fire & Marine Ins. Co.*[57] an insurer sought to recover from an adjoining landowner what it was forced to pay its insured for damages caused by an over-hanging limb which fell during a windstorm. There was an agreed statement of facts. The defendant and the insured were adjoining landowners. The defendant had a tree, some limbs of which overhung insured's land. The defendant had made a gratuitous promise in writing to remove the overhanging limbs but this was never done. The limbs were blown down during a windstorm. The Court held that there was no liability on the part of the defendant on the ground that the tree was of natural growth. The Court indicated that a different conclusion would have been reached if the tree had been planted by the defendant or a former possessor of the land.[58] Of course, the adjoining landowner could have removed that part of the tree which was over his land.

In addition to actual damages, in some instances by statute punitive damages are available to an owner of timber when cut or removed by another without authority. However, the statutory penalty is not allowable except in cases of willful trespass or gross negligence to take proper care to avoid a trespass of that nature. Hence, where the defendant's servants, without his knowledge or consent, cut trees on the plaintiff's property, the defendant was held not liable for statutory dam-

---

[56]*Id.* at 459, 15 So. (2d) at 683.
[57]24 So. (2d) 356 (Miss. 1946).
[58]See Buckingham v. Elliott, 62 Miss. 296, 52 Am. Rep. 188 (1884), wherein roots from defendant's tree ruined plaintiff's well and recovery was permitted.

age since the trespass could not be his trespass unless it was either expressly authorized by the defendant or caused by his gross negligence.[59] An opposite result is reached in those cases where there is a showing that the cutting was willfully done without proper precaution to prevent the trespass,[60] and this is true regardless of whether the cutter is an independent contractor, or an employee, where the person sought to be held liable had knowledge of the conduct of the cutter.[61]

Liability for actual damage will be approved where there is evidence to support a finding that a defendant caused surface water to collect and then discharged it in a body on plaintiff's land during the course of removal of clay containing bentonite from lands belonging to the defendant.[62]

G. Libel and Slander

It was held in the case of *Forman v. Miss. Publishers Corp.*[63] that a cause of action for libel accrues as soon as the newspaper or other publishing media containing the article alleged to be libelous is exhibited to a third person. The extent of the circulation of the alleged libelous article or writing is relevant on the issue of the quantum of damages.

There are only a few things in life more unpleasant than a quarrel with one's neighbors. As an example as to the ends that one will go over such a trivial matter as three missing pickets from a fence, see the case of *Gunter v. Reeves*[64] wherein one neighbor sued another in the following counts: slander, libel, false imprisonment, malicious prosecution and under our actionable word statute. There was a judgment on a verdict for the defendant and this was affirmed by the Supreme Court. Libel may not be bottomed on defendant's allegations in his affidavit for a search warrant as such allegations are absolutely privileged nor is there an action for false imprisonment when the arrest was made by an officer under a valid warrant. The finding of the jury for the defendant on the other counts was approved by the Court.

The plaintiff and his wife borrowed money and executed their deed of trust to secure the debt. The trustee published his notice of sale but

---

[59]Richardson v. Flowers, 194 Miss. 105, 11 So. (2d) 808 (1943). To the same effect is the case of Anderson-Tully Co. v. Campbell, 193 Miss. 790, 10 So. (2d) 445 (1942).

[60]Floyd v. Williams, 22 So. (2d) 365 (Miss. 1945).

[61]Fair Lumber Co. v. Weems, 15 So. (2d) 505 (Miss. 1943).

[62]Filtrol Corp. v. Hughes, 23 So. (2d) 891 (Miss. 1945).

[63]195 Miss. 90, 14 So. (2d) 344 (1943). *Cf.* Lee v. Memphis Publishing Co., 195 Miss. 264, 14 So. (2d) 351 (1943), wherein it was held that the publishers of the Commercial Appeal were not doing business in this state.

[64]21 So. (2d) 468 (Miss. 1945).

found that some of the land included in the deed of trust and the notice did not belong to the borrowers. The trustee then published a notice correcting the advertised foreclosure indicating that some of the land should not have been included in the trust deed and the previous notice. The mortgagor sued the trustee for libel on the theory that the notice of correction implied a charge of false pretence or fraud on the part of the borrower. The Court found that the publication was made in good faith and stated only truthful matters and denied recovery.[65]

In conversations between an employer and his employees there is a qualified privilege as a matter of law so long as the communication is made in good faith, fairly, impartially, and without exaggeration or introduction of irrelevant defamatory matter even though, otherwise, such statements would be slanderous. The burden is upon the plaintiff to show that the statements were made in bad faith and with malice and this is normally an issue for the decision of the jury.[66] In the case of *Montgomery Ward & Co., Inc. v. Skinner*,[67] by an evenly divided Court, it was held that this qualified privilege had been abused under the factual situation presented to the Court. The assistant manager of the defendant company was informed that some money had been found behind a plaque at the cash register. After consultation with the general manager, the assistant made the alleged slanderous remarks to three employees suspected of misappropriating or carelessly misplacing funds of the defendant company. The remarks were made to the three employees in the presence of others.[68] The Court found that the jury was warranted in finding that the charges were made willfully and with wanton disregard of the rights of the charged emloyees though made in the alternative to a relatively small group.

H. Miscellaneous

Plaintiff purchased the Riviera Hotel from the defendant for $75,000.00. Thereafter the plaintiff brought her action in deceit alleging that the defendant had made material misrepresentations upon which the

---

[65]Barcroft v. Armstrong, 21 So. (2d) 817 (Miss. 1945). See Milner Hotels, Inc. v. Dougherty, 195 Miss. 718, 15 So. (2d) 358 (1943), wherein nominal damages for slander were allowed because a hotel manager had breached the duty owed to a guest of the hotel.

[66]Louisiana Oil Co. v. Renno, 173 Miss. 609, 157 So. 705, 98 A.L.R. 1296 (1934). See also: Scott-Burr Stores Corp. v. Edgar, 181 Miss. 486, 177 So. 766 (1938) and Sumner Stores of Miss., Inc. v. Little. 187 Miss. 310, 192 So. 857 (1940).

[67]25 So. (2d) 572 (Miss. 1946) and companion case of Montgomery Ward & Co., Inc. v. Blakely, 25 So. (2d) 585 (Miss. 1946).

[68]"If one of you three don't tell me where you got it, I will fire the three of you. All damned three of you are going out of here this afternoon without a recommendation and with a blot on your record and character. . . . You are one of the three who trifled with the money." *Id.* at 574, 575.

plaintiff relied with reference to the furnishings for the hotel. The agreed purchase price was one made *in toto*. On the trial, the court refused to grant the defendant an instruction that the jury should find for the defendant if the plaintiff could have made an examination of the contents of the hotel and, upon examination, would have found the alleged shortage. The Supreme Court held that it was error to refuse this instruction. There was no showing that the failure of plaintiff to make an examination was induced by any statements made by the defendant.[69]

There is a diversity of opinion as to the liability of a public official when acting under legislative fiat. The majority view is that an official acts at his peril and that if the statute under which he acts is subsequently declared unconstitutional and a nullity, he is liable for his action taken thereunder. However, the minority view and the one adopted in this state,[70] provides that there shall be no liability where the officer performs his duty in good faith and in reliance on the validity of the statute involved.

The present Governor of Louisiana was a party complainant in one suit which reached the Supreme Court.[71] This was a suit to enjoin the defendant from using the name "Jimmie Davis" in connection with defendant's band, in broadcasts over the radio and in making recordings. The injunction was granted by the Chancellor in the lower court and this ruling was affirmed on appeal. The defendant's name was "James Davis Cockrell" and the Court said that he could continue to use that name and/or the name "Jimmie Davis Cockrell" and that the use by the defendant of the name "Jimmie Davis" would be unfair competition under the allegations of the bill of complaint and the proof.

---

[69]Hunt v. Sherrill, 195 Miss. 688, 15 So. (2d) 426 (1943). There is also a very worthwhile discussion as to the measure of damages in cases of this nature.

[70]Golden v. Thompson, 194 Miss. 241, 11 So. (2d) 906 (1943), wherein suit was brought against the principal of a high school and one of the trustees of the school for expelling two students who had failed to pay their tuition fees. See: Yazoo & M. V. R. Co. v. West, 78 Miss. 789, 29 So. 475 (1901).

[71]Cockrell v. Davis, 23 So. (2d) 256, 259 (1945). "The right to use a personal name in business, even one's own, is subject to the general rules in regard to unfair competition."

THE WORK OF THE 1944 AND 1946 SESSIONS OF THE MISSISSIPPI LEGISLATURE

*John W. Kyle**

The scope of this article is limited to a discussion of the legislative enactments of 1944 and 1946 which affect the substantive law administered by the courts of the state and the legal procedure in those courts. The number of acts which fall within these narrow limits and the variety of subjects dealt with in the acts referred to are so great that no detailed analysis of all of them can be given in an article of this kind. Several of the acts which are discussed in this article have a definite relation to the emergency created by the World War, and represent the legislative effort to supplement, in the field of legislation which is left to the states, the acts of Congress passed during the war emergency to safeguard the civil rights and the property rights of persons in the armed services of the United States.

We omit entirely from this discussion all reference to appropriation bills, revenue measures, departmental legislation, and statutes relating to county boards of supervisors, municipalities, the public school system, health and welfare agencies, and other administrative boards and commissions, and confine our discussion to those statutes which the lawyer in the general practice of his profession has occasion to consult and make use of.

Legislation Relating to Persons in the Military Service

World War II was a global war. The theaters of military and naval operations were all outside the continental limits of the United States. Thousands of persons, drawn from civilian life, were enlisted in the armed forces and transported overseas for service in the Western Pacific, in India, Burma, North Africa, in Iceland, or on the European battle fronts. Most of these fighting men remained abroad for one, two or three years. Many of them, at the time of their enlistment in the armed forces, were property owners and were engaged in active business operations in their home communities. For these reasons it became necessary for the legislature, at its 1944 and 1946 sessions, to enact new laws concerning the acknowledgment or proof of deeds executed by persons outside the continental limits of the United States, the execution and proof of wills of soldiers and sailors stationed in all parts of the world, the preservation of property owned by persons in the armed services who were reported

*Member Mississippi and Panola County Bars; Mississippi Senator from Panola County; Sardis, Mississippi.

missing in action, or interned in a neutral country, or captured by an enemy. After the close of hostilities other problems affecting the welfare of ex-service men required state legislative consideration, and several of these problems were dealt with during the 1946 session of the legislature.

Acknowledgment of Deeds and Other Instruments

Under Section 860 of the Mississippi Code of 1942, acknowledgment or proof of the execution of a deed or other instrument requiring acknowledgment or proof in foreign countries could be made only before a court of record, or the mayor or chief magistrate of a city, borough or corporation, or a commissioner residing in such country who had been appointed by the governor to take acknowledgments, or before a diplomatic or consular representative of the United States. None of these officers, authorized to take and certify acknowledgments or proofs of deeds, were ordinarily accessible to men engaged in military operations in the field or in naval operations on board ship. The legislature therefore enacted Chapter 166, Laws of 1944, which authorized the taking of acknowledgments and proof of deeds by any commissioned officer in the active service of any of the armed forces of the United States. In the same act, such commissioned officers are also authorized to take and certify affidavits to be used in the courts of this state; and under the provisions of the act all acknowledgments to any contract, agreement or other instrument of writing, and all affidavits to any instrument for use in the courts of this state, theretofore made by any person on active duty in the armed forces of the United States before any commissioned officer in the military service, were declared to be valid and binding in all respects. In Chapter 165, Laws of 1944, the legislature also validated all conveyances or other instruments of writing which had been acknowledged or proved before any commissioned officer in the military service of the United States; and such acknowledgments were declared to be valid and binding to the same extent as if the instruments of writing had been acknowledged or proved before an officer authorized by law to take acknowledgments in the State of Mississippi. In House Bill No. 493, Laws of 1946, the legislature again validated acknowledgments of deeds, contracts, agreements, or other instruments of writing, made before any commissioned officer in the military service of the United States. In House Bill No. 645, Laws of 1946, the legislature provided supplemental authority for the taking of acknowledgments and the performance of other notarial acts by commissioned officers in active service in the armed forces, and again validated acknowledgments of instruments, attestations of documents, administration of oaths, and execution of depositions and affidavits by such commissioned officers in the armed forces. The act

also provides that the instrument or document shall not be rendered invalid by the failure to state the place of execution or acknowledgment; and if the signature, rank and branch of service of such commissioned officer appear upon such instrument or document or certificate, no further proof of the authority of such officer to act shall be required.

Proof of Wills

In Chapter 167, Laws of 1944, the legislature provided that, in addition to the manner in which wills may be proved and admitted to probate in Mississippi under the Code of 1930, any will executed by any member of the armed forces of the United States during the present war may be proved and admitted to probate by the chancery court, or the chancellor in vacation, of the county in which the testator lived when he became a member of the armed forces, on the affidavit of any reliable person or persons sufficient to satisfy the chancellor that the testator is dead, and that the writing propounded for probate was signed by the testator as his last will and testament, and that the affidavit or testimony of the subscribing witnesses of such will cannot reasonably be obtained, and that there is good reason for such will to be then probated.

Appointment of Guardian for Person Officially Reported Missing in Action

In House Bill No. 646, Laws of 1946, the legislature provided that whenever a person, who, while serving in or with the armed forces of the United States, or while serving as a merchant seaman, has been officially reported or listed as missing, or missing in action, or interned in a neutral country, or beleaguered, besieged, or captured by an enemy, has an interest in any property in this state, or is a legal resident of this state, and has not appointed an attorney-in-fact with authority to act in his behalf in regard to his property or interest, the chancery court, or the chancellor in vacation, of the county of such absentee's legal residence, or the county where the absentee's property is situated, may appoint a guardian to take charge of the absentee's estate. The court is given full discretion in the matter of the selection of the guardian, and may require the guardian to give a corporate surety bond and to make reports. A guardian thus appointed is vested with the same power and authority as the guardian of the estate of a minor, or person of unsound mind. At any time after the appointment of such guardian, upon petition signed by the absentee, or on petition of an attorney-in-fact, acting under a proper power of attorney, the court shall direct the termination of the guardianship and the transfer of all property held thereunder to the absentee or to the designated attorney-in-fact. Likewise, if at any time after the

appointment of such guardian it shall appear that the absentee has died and an executor or administrator has been appointed for his estate, the court shall direct the termination of the guardianship and the transfer of all property of the deceased absentee held thereunder to such executor or administrator.

Proof of Death of Persons in the Armed Services

In House Bill No. 644, Laws of 1946, the legislature provided that a written finding of presumed death, made by the Secretary of War, the Secretary of the Navy, or other officer or employee of the United States, authorized to make such finding, pursuant to the Federal Missing Persons Act, or a duly certified copy of such finding, shall be received in any court, office or other place in this state as prima facie evidence of the death of the person therein found to be dead, and of the date, circumstances and place of his disappearance. In the same act, it is also provided that an official written report or record, or duly certified copy thereof, that a person is missing, missing in action, interned in a neutral country, or captured by an enemy, or is dead, or is alive, made by any officer or employee of the United States authorized by the Federal Missing Persons Act to make same, shall be received in any court, office or other place in this state as prima facie evidence that such person is missing, missing in action, interned in a neutral country, or captured by an enemy, or is dead, or is alive, as the case may be.

Commitment of Veterans of Unsound Mind for Treatment by the Veterans Administration

Chapter 176, Laws of 1944, provides for the commitment to the Veterans Administration, or other agency of the United States, of persons of unsound mind who are eligible for care and treatment by the Veterans Administration. When, under the provisions of the act, any person is committed to the Veterans Administration or other federal agency for care and treatment, pursuant to an order of the Court, jurisdiction is retained in the committing court of this state to inquire into the mental condition of the person so committed, and to determine the necessity for continuance of his restraint; and this authority continues notwithstanding the fact that the veteran may be confined in an institution situated outside of the state. Provision is also made in the act for the transfer of veterans entitled to care and treatment by the Veterans Adminisration from state owned hospitals to the Veterans Administration, or other federal agency.

Removal of Disability of Minority of Veteran Entitled to Veteran's Loan

As an aid to veterans in obtaining loans under the Service Men's Readjustment Act of 1944, the legislature, in House Bill No. 2, Laws of 1946, removed the disability of minority of any person otherwise eligible for guaranty of a loan under the Service Men's Readjustment Act, and of the spouse of such person, solely for the purpose of enabling such person to acquire, encumber or sell and convey property and incur indebtedness in reference thereto. The same subject was dealt with again in House Bill No. 840, Laws of 1946, in which the disability of minority of any person eligible for guaranty or insurance in whole or in part of a loan or loans under the Service Men's Readjustment Act, or under the National Housing Act, and of the spouse of such person, was removed for the purpose, and to the extent only, of enabling such person to obtain the benefits of said acts.

Youth Courts

House Bill No. 15, Laws of 1946, creating and establishing youth courts, was enacted upon the recommendation of a special committee, which had been appointed to make a study of the subject prior to the convening of the legislature. Under the provisions of the act youth courts are created as a part of the county court of each county having a county court, and as a part of the chancery court of each county in which no county court is maintained. As defined in the act, a "child" or "youth" means a person less than eighteen years of age. The youth court is given jurisdiction over juvenile offenders and children whose parents, or other persons legally responsible for their care, neglect or refuse to provide for them proper or necessary care.

Under Section 5 of the act, whenever any person informs the youth court that a child residing within the county is within the purview of the act, the court is authorized to make a preliminary investigation for the purpose of determining whether the interest of the child or the public requires the court to take further action. The court may request the county department of public welfare to make such investigation and report its findings to the court. The court may then authorize a petition to be filed by a youth counselor, or by the county or district attorney, or any other reputable person, to have such child committed to an institution or other agency established for the care of delinquent or neglected children. Upon the filing of such petition summons shall be issued for the parents or other person having the custody or control of the child requiring such person to appear personally and bring the child before

the court at the time and place stated in the summons, and to show cause, if any, why the child should not be adjudged a delinquent or neglected child. Upon the hearing of the matter the court shall determine whether the child is a delinquent or neglected child within the purview of the act; and if the court shall find that the child is a delinquent or neglected child, it shall so adjudge, and by order duly entered proceed as follows: (1) Place the child under supervision in his own home, or in the care of a relative, under such terms as the court shall direct; or (2) place the child in a suitable family home, or commit him to the custody of a suitable private institution or agency able and willing to receive him; or (3) if the child be adjudged delinquent, the court may commit the child to the custody of a state supported training school.

No decree or order of adjudication concerning any child shall recite any of the facts or circumstances upon which such adjudication is based. In all cases after the adjudication the court shall retain jurisdiction for the purpose of making such supplemental orders from time to time as may appear to be necessary and proper. The act expressly provides that no adjudication upon the status of any child shall operate to impose any of the civil disabilities ordinarily imposed upon adults by conviction of crime, nor shall any child be deemed a criminal by reason of such adjudication.

In any county in which the chancery court serves as a youth court the judge of the chancery court may appoint the chancery clerk, or any other suitable person, to act as a regular or special referee in cases concerning children within the jurisdiction of the court; and all cases coming within the purview of this act may be initiated before and heard by and adjudicated by such referee. All orders made by a referee shall be approved or disapproved by the chancellor as judge of the youth court in term time in the same manner as is now required by law for the approval of vacation orders of the chancery clerk.

If a child thirteen years of age or older is charged with an offense which would be a felony if committed by an adult, the court, after investigation, may in its discretion retain jurisdiction and proceed with the case as a delinquency case; or the court may certify such child for proper criminal proceedings to any court which would have trial jurisdiction of such offense if committed by an adult. The act expressly provides, however, that the circuit court shall have exclusive jurisdiction if the child be charged with any crime which is punishable, upon conviction, by life imprisonment or death.

In Section 17 of the act it is expressly provided that no child under thirteen years of age shall be prosecuted criminally for a misdemeanor or a felony; but such cases must be handled by the youth court.

Uniform Stock Transfer Act

In 1946 the legislature enacted House Bill No. 82, an act to make uniform the law governing the transfer of shares of stock in a corporation. The act is in part a codification of the law already in force relating to the transfer of stock in a corporation; but, as in the case of the Uniform Negotiable Instruments Act, certain changes have been made in the law as a result of the enactment of the Uniform Stock Transfer Act, and the full meaning of the changes thus made can be accurately determined and fully understood only by a careful study of the act itself.

In the first section of the act it is expressly provided that title to the certificate and the shares represented thereby can be transferred only (a) by delivery of the certificate endorsed either in blank or to a specified person by the person appearing by the certificate to be the owner of the shares represented thereby, or (b) by delivery of the certificate and a separate document containing a written assignment of the certificate, or a power of attorney to sell, assign or transfer the same or the shares represented thereby, signed by the person appearing by the certificate to be the owner of the share represented thereby. The provisions of this section are made applicable although the charter or articles of incorporation under which the certificate is issued and the certificate itself provide that the shares represented thereby shall be transferable only on the books of the corporation, or shall be registered by a registrar, or transferred by a transfer agent.

In the succeeding sections the legal effect of the endorsement and delivery of the certificate, the effect of endorsements and delivery obtained by fraud, the rights of purchasers of certificates or shares which have been rescinded, the rights of holders of certificates which have been transferred without endorsement, and the rights of creditors to reach certificates of stock which are owned by defaulting debtors, are defined. The act by its terms applies only to certificates issued after the taking effect of the act.

Release of Powers of Appointment Act

Another act passed at the 1946 session, to make uniform the laws of the several states, is Senate Bill No. 246, which may be referred to as the "Release of Powers of Appointment Act." The terms used in the act are technical, and the act itself must be carefully studied, if its meaning

is to be understood. The act provides a definite manner of procedure for the release of powers of appointment conferred by wills, trust instruments, or other instruments creating powers of appointment. The methods of procedure provided in the act for the release of powers of appointment are not exclusive, but are in addition to all other methods which may be available to the donee of the power for releasing the power in whole or in part. Provision is made in the act for the recordation of a release of a power of appointment in the county in which real estate subject to the power of appointment is situated. The provisions of the act relate to the release of a power of appointment and the method of procedure which may be followed to effect such release. The nature of the power itself, and the terms and conditions under which it may be exercised, the rights of the donee or person having the right to exercise the power, and the rights of persons who may be benefited by the exercise of the power or who may be benefited by the failure of the donee to exercise the power, are to be determined by the terms of the instrument in which the power is created.

Estates of Minors—Guardian and Ward

In Chapter 307, Laws of 1944, the legislature authorized the court to permit investments by guardians in shares of building and loan associations. In Chapter 308, Laws of 1944, the legislature provided that delay rentals payable under a mineral lease to a minor who has no legal guardian, if the amount of such rentals does not exceed fifty dollars in any one year, may be paid to a minor directly, if he be above the age of twelve years, or to the father or mother of such minor for such minor's use and benefit, without the intervention of the court. In Senate Bill No. 65, Laws of 1946, the statutes regulating the procedure for the removal of the disabilities of minority were amended so as to provide that in cases where a minor has been adopted by a decree of the court the adoptive parents shall be made parties to the proceeding for the removal of the disabilities of minority of such minor. In House Bill No. 449, Laws of 1946, the legislature amended Section 419 of the Mississippi Code of 1942 so as to provide that two adult relatives of a ward within the third degree may join in the guardian's petition for sale of real estate and thereby dispense with the notice and summons required in said Section 419 of the Code. The legislature in the same act also eliminated the requirement that the chancery clerk execute the deed of conveyance of lands sold by the guardian pursuant to the decree of the court.

Chancery Court Procedure—Partition of Lands—Proof of Wills

In addition to other changes in the procedure in the chancery court, which are mentioned elsewhere in this article. the following amendments to existing statutes should be noted: in House Bill No. 61, Laws of 1946, the legislature authorized hearings by the chancellor in vacation upon petitions for vacating or altering recorded maps or plats. In House Bill No. 113, Laws of 1946, a form is prescribed for non-resident summons by publication in causes which are to be tried and determined by the chancellor in vacation. In Senate Bill No. 302, Laws of 1946, provision is made for the making of final records, at the request of any interested party, of suits involving the title to real estate, even though such suits may have been long since terminated. Final records of proceedings in a county court are also provided for, where such procedings affect the title to lands in the county.

A more important change in the law relating to procedure in the chancery court is contained in Senate Bill No. 149, Laws of 1946, which provides that the consent of any party against whom a decree pro confesso has been taken to a trial in vacation shall not be required.

In House Bill No. 568, Laws of 1946, the legislature amended the law relating to the partition of land by decree of the chancery court, so as to provide that any person owning an indefeasible fee simple title to an undivided interest in land may procure a partition of such land and have the interest of such person set apart in fee simple, free from the claims of life-tenants, remaindermen or reversioners. The act provides that all persons in interest must be made parties to the proceeding, except that "in cases where a part of said freehold is owned by persons owning a life estate therein or a life tenancy therein subject to the rights of remaindermen or reversioners, then in such event it shall only be necessary that the person or persons owning or claiming a life estate or life tenancy therein be made parties." Prior to the enactment of House Bill No. 568, an owner in fee simple of an undivided interest in land in which the other interests were owned by life tenants and remaindermen or reversioners, could not procure a partition which would be binding upon such remaindermen or reversioners. There was a real need for an amendment to the statute; but it is doubtful whether the legislature was justified in trying to dispense with the requirement that remaindermen and reversioners, whose interests are to be affected by the partition decree, should be made parties to the proceeding.

By the enactment of House Bill No. 634, Laws of 1946, the legislature made an important change in the law relating to the proof of wills.

House Bill No. 634 provides that the due execution of the will, whether heretofore or hereafter executed, must be proved by at least one of the subscribing witnesses, *if alive and competent to testify;* but, if none of the subscribing witnesses can be produced to prove the execution of the will, it may be established by proving the hand-writing of the testator and of the subscribing witnesses to the will, or of some of them. Prior to the enactment of House Bill No. 634 the law required that the due execution of the will be proved by at least one of the subscribing witnesses, *if alive and resident in the state, and competent to testify.* Under the new act the words "resident in the state" are omitted, and the will must be proved by at least one of the subscribing witnesses if alive and competent to testify.

In Chapter 315, Laws of 1944, the legislature amended the privileged communications statute, Section 1697, Mississippi Code of 1942, by providing that the statutory prohibition against disclosure by a physician of communications of a patient may be waived, in case of the death of the patient, by his personal representative or legal heirs. The right to waive such privilege prior to 1944 was limited to the patient himself. The Supreme Court, in McCaw v. Turner, 126 Miss. 260, 88 So. 705, had expressly held that the privilege could not be waived by the patient's heirs, executor or administrator.

Mississippi Law Journal

JOURNAL of the MISSISSIPPI STATE BAR

VOLUME XVIII **DECEMBER, 1946** **NUMBER 1**

MEMBERS OF THE LAW JOURNAL BOARD

BAR COMMITTEE

HUBERT LIPSCOMB, *Chairman*
Jackson
LESLIE DARDEN
New Albany
R. W. THOMPSON, JR.
Gulfport
W. G. ROBERDS
Jackson
L. G. FANT, JR.
Holly Springs
W. T. WYNN
Greenville
JAMES McCLURE
Sardis
EDMUND L. BRUNINI
Vicksburg

FACULTY ADVISORS

F. HODGE O'NEAL
FORD W. HALL

EDITORIAL BOARD

WILLIAM H. BIZZELL
Editor
HARRY O. HOFFMAN, JR.
Business Manager
GEORGE J. SCHWEIZER, JR.
Note Editor
ROBERT P. ROBERTS, JR.
Case Editor
OWEN T. PALMER, JR.
Assistant Editor

ASSOCIATE EDITORS

ROGER C. LANDRUM
GRIFFIN NORQUIST
JAMES C. CRIGLER
GERALD ADAMS
ARMIS E. HAWKINS
CHARLES C. JACOBS, JR.
ROBERT N. McNUTT
EDWARD F. McDOWELL
R. W. HEIDELBERG, JR.
W. D. COLEMAN
JAMES S. DALE, JR.
REGINALD A. GRAY, JR.
JAMES T. BRIDGES
ROBERT H. McFARLAND
KNOX WHITE

The JOURNAL seeks to print matter of merit and interest and, although desirous of offering freedom to contributors, assumes no responsibility for the views expressed herein.

MISSISSIPPI STATE BAR

1946-1947

OFFICERS

R. C. Stovall of Columbus ..... President
Toxey Hall of Columbia ..... First Vice-President
Chas. S. Tindall, Jr. of Greenville ..... Second Vice-President
Mrs. Margaret McLean of Jackson ..... Secretary-Treasurer

COMMISSIONERS

T. A. Clark ..... Iuka
R. W. Thompson, Jr. ..... Gulfport
Leslie Darden ..... New Albany
Jerome S. Hafter ..... Greenville
J. Hoy Hathorn ..... Louisville
Everette G. Truly, Jr. ..... Fayette
Fulton Thompson ..... Jackson
H. G. Stamper ..... Union
J. D. Thames ..... Vicksburg
Tally D. Riddell ..... Meridian
J. T. Lowe ..... Tunica
J. Kearney Travis ..... Hattiesburg
R. S. Tullos ..... Raleigh
Louis Alford ..... McComb
L. C. Bridges ..... Purvis
J. E. Caradine ..... West Point
J. H. Caldwell ..... Charleston

NOTE

Taxation of Oil and Gas Interests in Mississippi

Three recent decisions of the Mississippi Supreme Court have raised the problem of the State's power to tax interests in oil and gas.[1] This Note attempts to analyze these decisions.

Although a recent Note in this *Journal*[2] discussed property rights in oil and gas in Mississippi, a brief preliminary review of the legal nature of various possible oil and gas interests will be helpful. These interests may be divided into the following categories: (1) those existing before any attempt at separation of the oil and gas from the surface estate; (2) those existing when an outright transfer of the oil and gas interest has been attempted; and (3) those created by the execution of an "oil and gas lease,"[3] including (a) the interest of the lessee and (b) the royalty interest (whether retained by the owner of the surface estate or owned by a third person).

When the problem of the interest held by the owner of the surface estate in the oil and gas beneath his land first arose in Mississippi, three distinct theories had been developed in other jurisdictions. These theories are: the Non-Ownership Theory, the Qualified Ownership Theory, and the Ownership in Place Theory.[4] The Non-Ownership Theory is that an estate in the oil and gas is not created until it has been brought to the surface and reduced to possession. This theory has been found more

---

[1]Gulf Refining Company v. Stone, State Tax Commissioner, 197 Miss. 713, 21 So. (2d) 19 (1945); Smith County Oil Company v. Board of Supervisors of Simpson County, 25 So. (2d) 457 (Miss. 1946); Stern v. Parker, 25 So. (2d) 787 (Miss. 1946), *sug. error overr.*, 27 So. (2d) 402 (Miss. 1946). The cases will be considered in the order listed.

[2]Note (1941) 13 Miss. L. J. 427.

[3]The standard practice of referring to the standard commercial "lease" of an interest in oil and gas as an "oil and gas lease" will be used herein without going into the technical inconsistencies of such terminology: 1 Summers, Oil and Gas (Perm. ed. 1938) § 153. *See* Union Sulphur Co., Inc., v. Lognion, 26 So. (2d) 845 (La. 1946) (distinction between "sale of a royalty interest" and "sale of a mineral interest" in oil and gas).

[4]The nomenclature applied throughout this Note in describing the theories of ownership in oil and gas has not been followed by all courts and writers. Although called by different names the theories are substantially, if not exactly, the same. For example, the Qualified Ownership Theory (as used herein) is sometimes referred to by courts and writers as the Non-Ownership Rule in contradistionction to the Ownership in Place Doctrine, which in turn is then referred to as the "ownership" theory. But when so used, the "Non-Ownership Rule" is not to be confused with the Non-Ownership Theory as used in this Note (see note 10 *infra*). The Qualified Ownership Theory is often called the "exclusive right" theory and, at the same time, the Ownership in Place Theory is called the "ownership" or "title" theory: Blake, *The Oil and Gas Lease* (1940) 13 So. Calif. L. Rev. 304: Note (1943) 146 A.L.R. 880, 882. The Qualified Ownership Theory might also be called the "ownership" theory while the Ownership in Place Theory would be called the "absolute ownership" theory.

objectionable than the others and seldom has been adopted.[5] The Qualified Ownership Theory is that a landowner has a *property interest* in the oil and gas under his land but does not own them in the same sense that he owns the surface or solid minerals. Under this theory, which has become the minority rule,[6] it generally is held that a conveyance creating a separate interest in oil and gas does not create separate ownership but merely conveys the interest which the landowner had, which interest is in the nature of a *profit a prendre*.[7]

The Ownership in Place theory considers the owner of the surface as owning the oil and gas in place beneath his land.[8] This theory, as

---

[5]The Pennsylvania Court early indicated a non-ownership theory in Westmoreland Gas. Co. v. De Witt, 130 Pa. 235, 18 A. 724, 5 L.R.A. 731 (1889), but later changed their view in Hague v. Wheeler, 157 Pa. 324, 27 A. 714, 22 A.L.R. 141, 37 Am. St. Rep. 736 (1893) and Barnsdall v. Bradford Gas Co., 225 Pa. 338, 74 A. 207 (1909). *Accord*, Comment (1938) 4 UNI. OF PITT. L. REV. 274. A similar development has taken place in California and Louisiana: Colby, *Law of Oil and Gas* (1943) 31 CALIF. L. REV. 357; Walker, *The Nature of Legal Interest in Oil and Gas in Louisiana* (1942) 1 LOYOLA L. REV. 146. The rule in Oklahoma has changed: Kolachny v. Galbreath, 26 Okla. 772, 110 P. 902 (1910); Cutt v. Koslosky, 165 Okla. 135, 25 P. (2d) 290 (1933); Sunray Oil Co. v. Cortez Oil Co., 188 Okla. 690, 112 P. (2d) 792 (1941); Ohio Oil Co. v. Sharp, 135 F. (2d) 303 (C.C.A. 10th, 1943). *Accord*, GLASSMIRE, OIL AND GAS LEASES AND ROYALTIES (1938) § 36; 1 SUMMERS, *op. cit. supra* note 3, § 63.

[6]Moses, *The Constitutional, Legislative and Judicial Growth of Oil and Gas Conservation Statutes* (1941) 13 MISS. L. J. 353, 358 n.13, 14; Blake, *The Oil and Gas Lease* (1940) 13 So. CALIF. L. REV. 304, 306 n.4, 5; *see* Stokley v. State *ex rel.* Knox. Att'y Gen., 149 Miss. 435, 450, 115 So. 563, 567 (1927) (dissenting opinion). *Accord*, Note (1923) 29 A.L.R. 586. *But see* Walker, *The Nature of the Property Interest Created by an Oil and Gas Lease in Texas* (1928) 7 TEX. L. REV. 1, 4 n.8.

[7]GLASSMIRE, OIL AND GAS LEASES AND ROYALTIES (1938) § 31; 1 SUMMERS, OIL AND GAS (Perm. ed. 1938) §§ 136, 153; Colby, *Law of Oil and Gas* (1942) 31 CALIF. L. REV. 357; Walker, *The Nature of Legal Interest in Oil and Gas in Louisiana* (1942) 1 LOYOLA L. REV. 146; Note (1943) 146 A.L.R. 880; 24 AM. JUR. 522 n.13.

[8]1 SUMMERS, *op. cit. supra* note 7 §§ 136, 153; Walker, *Fee Simple Ownership of Oil and Gas in Texas* (1928) 6 TEX. L. REV. 128; Walker, *loc. cit. supra* note 6 at 1; Veasy, *The Law of Oil and Gas* (1920) 18 MICH. L. REV. 445. *Contra:* Greer, *The Ownership of Petroleum Oil and Natural Gas in Place* (1923) 1 TEX. L. REV. 162; *see* Roberts, *Inconsistencies Under the "Ownership in Place" Theory of Oil and Gas* (1940) 29 KY. L. J. 3, 17, where it is stated: "If a taxing statute recites that all white horses shall be taxed as black horses, it can hardly be declared unconstitutional on that account provided it has not violated the rules as to classification in other respects. For that reason the Texas decisions upholding taxes on the lessee's interest under an oil and gas lease are of little value in sustaining the soundness of that court's contention that the lessee under such a lease acquires the ownership of the oil and gas in place rather than a profit a prendre, as maintained by the California and Kansas courts. Besides we have seen that a profit a prendre is an interest in real property." *See*, 1 THORNTON, LAW OF OIL AND GAS (4th ed. 1925) 95.

developed by the Texas courts and often referred to as the Texas Rule,[9] is set forth by Professor A. W. Walker, Jr., as follows:

> . . . the landowner is regarded as having title to the oil and gas in place, and that he may by granting these minerals and excepting the surface estate, or by granting the surface estate and excepting these minerals, effect a horizontal severance and the creation of two separate and distinct estates, viz., a fee simple estate in the surface and a fee simple or some lesser estate in the oil and gas, the owner of the latter estate having certain necessarily implied easement rights in the surface estate . . . If the landowner is not regarded as owning the oil and gas *in situ* any conveyance that he may make of these minerals, whether it be in the form of a lease, a grant, or an exception from a grant of the land, cannot possibly create a separate corporeal estate in the oil and gas . . . while adoption of the ownership theory of the nature of the landowner's interest in oil and gas does not necessarily *determine* the interest created by an oil and gas lease, it does render it *possible* to construe the lease as a conveyance of a corporeal estate in the oil and gas, something which is obviously impossible under the non-ownership theory.[10]

Whether the various interests created by the owner of the surface in the mineral estate are taxable is easier to determine under this theory than under the Qualified Ownership Theory. Since the oil and gas estate is a fee simple in land, it should be subject to conveyance, reservation, exception, lease for a term of years or upon condition; and each of the resulting interests should be taxable separately as realty.[11] Regardless of whether a state has adopted the Qualified Ownership or Ownership in Place Theory as to the landowner's interest in the oil and gas, most jurisdictions agree that these minerals, actual or prospective,

---

[9]Texas Co. v. Daugherty, 107 Tex. 226, 176 S.W. 717, L.R.A. 1917F 989 (1915); Stephens County v. Mid-Kansas Oil and Gas Co., 113 Tex. 160, 254 S.W. 290, 29 A.L.R. 566 (1923); Texas Co. v. Davis, 113 Tex. 321, 254 S.W. 304, 255 S.W. 601 (1923); Sheffield v. Hogg, 124 Tex. 290, 77 S.W. (2d) 1021, 80 S.W. (2d) 741 (1934); Holloway's Unknown Heirs v. Whatley, 133 Tex. 608, 131 S.W. (2d) 89, 123 A.L.R. 843 (1939); *see* Waggoner Estate v. Wichita County, 273 U.S. 113, 47 S.Ct. 271, 71 L.Ed. 566 (1927).

[10]Walker, *loc. cit. supra* note 6, at 3-4. When "non-ownership theory" is used therein, in view of note 3 of Walker's article, it is believed the term is synonymous to "Qualified Ownership Theory" as used in this Note, but notice note 5 of Walker's article. See note 4 *supra*.

[11]4 SUMMERS, *op. cit. supra* note 7, §§ 782, 783; THUSS, TEXAS OIL AND GAS (1935) §§ 314, 315; Texas Co. v. Dougherty, Stephens County v. Mid-Kansas Oil and Gas Co., both *supra* note 9. *See*, Huffman v. Henderson Co. 184 Ark. 278, 42 S.W. (2d) 221 (1931); State v. Ark. Fuel Oil Co. 179 Ark. 848, 18 S.W. (2d) 906 (1929); Liberty Cent. Trust Co. v. Gilliland Oil Co., 297 F. 494 (N.D. Tex. 1924); Simmons Coal Co. v. Board of Review 282 Ill. 396, 118 N.E. 753 (1918); Graciosa Oil Co. v. Santa Barbara County 155 Cal. 140, 99 P. 483, 20 L.R.A. (NS) 211 (1909). *Accord*, Haglund, *Taxation of Oil and Gas Interests* (1932) 20 Ky. L. J. 224, 230; Notes (1928) 59 A.L.R. 701, (1923) 27 A.L.R. 586.

may be included in the ad valorem assessment of the land.[12] Mississippi has adopted the Ownership in Place Theory as to the landowner's interest in the mineral estate,[13] and the court has indicated that oil and gas can be considered in assessing the value of the land for ad valorem taxes.[14]

Originally the interest conveyed under the Qualified Ownership Theory, whether by lease or deed, was thought to be vastly different from that under the Ownership in Place Theory. Under the Qualified Ownership Theory, a grant of the minerals merely gave the exclusive right to explore for and reduce the minerals to possession, together with the surface easements necessary to obtain possession of the minerals. A conveyance of this *exclusive right* is deemed to create a *profit a prendre,*[15] which is analogous to an estate in fee simple when created in perpetuity. The early "migratory" concept of petroleum deposits, which mineralogy has disproved, influenced the development of the Qualified Ownership Theory. More accurate mineralogical data and the need for creation of a separate estate in minerals have led those jurisdiction following the Qualified Ownership Theory to achieve the same result obtained under the Ownership in Place Theory by developing the common law concept of a *profit a prendre.* The actual difference between the two theories, therefore, now is largely technical.[16] A conveyance of the minerals under the Ownership in Place Theory, following the common law concept of ownership of the surface estate extending to the center of the earth, created a separate estate.[17] Under either theory, most jurisdictions tax

---

[12]4 SUMMERS, *op. cit. supra* note 7, §§ 783-787, 789, 791, 795 and 796; 51 AM. JUR. 454, 455.

[13]Whelam v. Johnston, 192 Miss. 673, 6 So. (2d) 300 (1942); Merrill Engineering Co. v. Capital Nat. Bank of Jackson, 192 Miss. 378, 5 So. (2d) 666 (1942); Liverpool & L. & G. Ins. Co. v. Delaney, 190 MISS. 404, 200 So. 440 (1941); Stern v. Great Southern Land Co., 148 Miss. 649, 114 So. 739 (1927).

[14]This is indicated in dictum in the *Gulf Refining Company* case and the holding in the *Stern* case (both *supra* note 1), which are discussed hereafter in this Note.

[15]24 AM. JUR. 522; 1 SUMMERS, *op. cit. supra* note 7, § 154; Blake, *The Oil and Gas Lease* (1940) 13 So. CALIF. L. REV. 304, 327-328; Walker, *loc. cit. supra* note 6 at 1 *et seq.*; Note (1941) 13 MISS. L. J. 427, 435; Comment (1938) 4 UNI. of PITT. L. REV. 274.

[16]Adsit, *Oil Estate* (1936) 9 So. CALIF. L. REV. 299, 300: "These two doctrines, however, are not fundamentally different. Under the title [Ownership in Place] theory the landowner owns the fee to oil in situ, whereas under the opposite view he owns the fee to the 'exclusive right' to oil in situ. Under the former theory, no difficulty is experienced in dividing and severing the oil estate from the general estate in the land and, when so granted, an estate in corporeal real property vests in the grantee. Thus, 'the earth may be divided horizontally as well as vertically,' with or without a grant of an estate in oil. Similar results may be had under the 'exclusive right' [Qualified Ownership] theory." *Accord,* Colby, *Law of Oil and Gas* (1943) 31 CALIF. L. REV. 357; Blake, *loc. cit. supra* note 15 at 308; Note (1943) 146 A.L.R. 880, 881-882; Comments (1937) 25 CALIF. L. REV. 220 and 230; SUMMERS, LAW OF OIL & GAS (1927) 135.

[17]24 AM. JUR. 519-520; Walker, *loc. cit. supra* note 7, at 1 *et seq.*

the interest created.[18] Mississippi has applied the Ownership in Place Theory to severance of oil and gas,[19] and has cited with approval[20] the leading Texas case of *Stephens County v. Mid-Kansas Oil & Gas Company*.[21] In the *Stephens County* case an oil and gas lease was held to create a base, qualified, or determinable fee which was subject to taxation as realty. Since Mississippi has held that a separate estate in oil and gas is a determinable fee, this interest should be taxable as realty.[22]

The nature of the interest created in the lessee by an oil and gas lease generally has depended upon the theory applicable in a particular jurisdiction to the landowner's interest in these minerals prior to severance. The Pennsylvania courts, however, originally determined the nature of the interest created by examining the language used in the granting clause of each lease.[23] Not only did this method develop inconsistencies, but difficulties of interpretation rendered the procedure impractical. Many jurisdictions following both the Qualified Ownership and Ownership in Place Theories now regard the interest of the lessee under an oil and gas lease as an incorporeal hereditament in the nature of a *profit a prendre*.[24] The *profit a prendre* concept has received favorable support by writers and courts since it is sufficiently flexible to permit solution of problems arising from complications in the transfer and taxation of oil and gas.[25] All jurisdictions agree that a *profit a prendre* is

---

[18]See notes 11, 12 *supra*; Graciosa Oil Co. v. Santa Barbara County, 115 Cal. 140, 99 P. 483, 20 L.R.A.(N.S.) 211 (1909); Mound City Brick & Gas Co. v. Goodspeed Gas & Oil Co., 83 Kan. 136, 109 P. 1002 (1902); *cf.* Shaw v. Watson, 151 La. 893, 92 So. 375 (1922). *Accord,* GLASSMIRE, *op. cit. supra* note 7, § 97.

[19]Lloyd's Estate v. Mullen Tractor and Equipment Co., 192 Miss. 62, 4 So. (2d) 282 (1941). Pace v. State *ex rel.* Rice, Att'y Gen., 191 Miss. 780, 4 So. (2d) 270 (1941); Stokely v. State *ex rel.* Knox, Att'y Gen., 149 Miss. 435, 115 So. 563 (1928); *cf.* Allen v. Boykin, 24 So. (2d) 748 (Miss. 1946); McNeese v. Renner, 197 Miss. 203, 21 So. (2d) 7 (1945); Cook v. Farley, 195 Miss. 638, 15 So. (2d) 352 (1943). See cases cited *supra* note 13.

[20]Stokely v. State *ex rel.* Knox, Att'y Gen., 149 Miss. 435, 447, 115 So. 563, 566 (1927).

[21]113 Tex. 160, 254 S.W. 290, 29 A.L.R. 566 (1923). The court, in reaching its decision, acknowledges the peculiar physical characteristics of oil and gas, and reaches its conclusion despite this (a factor that has given some courts trouble) and regardless of the character of the granting clause (see note 23 *infra*).

[22]Lloyd's Estate v. Mullen Tractor & Equipment Co. and Stern v. Great Southern Land Co., both *supra* note 19, recognize a separate estate (in the nature of a determinable fee) in minerals, and sections 9769, 9770, 9789, 9790, MISS. CODE ANN. (1942), clearly provide for taxation of all estates in land, mineral or otherwise. The three cases (see note 1 *supra*) under discussion herein develop the application the Mississippi Supreme Court has given these cases and statutes.

[23]Walker, *loc. cit. supra* note 7, at 4 n.8; Note (1941) MISS. L. J. 427, 435 n.36.

[24]24 AM. JUR. 544-547; see note 15 *supra.*

[25]Blake, *The Oil and Gas Lease* (1940) 13 So. CALIF. L. REV. 304, 325: "If it can be said that there is a majority rule with respect to the nature of the lessee's interest in the oil and gas which may underlie leased lands, it is that this aspect of the lessee's interest is a *profit a prendre.* This view has found expression in both

subject to taxation, but there is some difference as to whether the interest will be classified as real or personal property.[26] Under the Ownership in Place Theory, the Texas courts have led in establishing in the lessee a separate estate in the fractional interest of the minerals conveyed.[27] The Texas rule considers the ordinary commercial lease, before the division of the mineral estate has become complicated by other fractional interests, as vesting in the lessee a base or determinable fee in seven-eighths of the oil and gas.[28] In Texas, and those jurisdictions following the application of this theory to the lessee, the lessee's interest is assessed separately as realty.[29] The Mississippi Supreme Court, by applying the Ownership in Place Theory to the landowner and to conveyances of a mineral estate by the landowner, indicates that it apparently is in accord with the Texas view as to the nature of interest created in the lessee.[30] It would follow logically that Mississippi should subject the lessee's interest to separate assessment for ad valorem taxes. What has actually resulted will be developed in the three principal cases to be considered hereafter.

In addition to the interest created in the lessee by an oil and gas lease, an interest known as "royalty" is created in the minerals.[31] A royalty interest may be created by grant, reservation, or exception in a deed as an estate separate from the surface; or it may be created by exception or reservation in an oil and gas lease, in which case it may or may not be owned separate from the surface estate.[32] A royalty interest is most often classified as a rent or a profit issuing from land.[33] The doctrine that a royalty interest is rent has been adopted in jurisdictions

---

exclusive right and *ownership* jurisdictions, and has received considerable support by researchers on the subject. Perhaps the most prominent minority in this matter is that of Texas, an *ownership* State, which adheres to the doctrine that, irrespective of the type of granting clause, the oil and gas lease operates as a conveyance of title to the oil and gas in place." *Accord,* Adsit, *Oil Estates* (1936) 9 So. CALIF. L. REV. 299; Greer, *loc. cit. supra* note 8, at 162; Roberts, *loc. cit. supra* note 8, at 3; Veasey, *loc. cit. supra* note 8, at 35; Notes (1941) 13 MISS. L. J. 427, 435; (1937) 26 CAL. L. REV. 359; (1917) 31 HARV. L. REV. 882; (1939) 46 W. VA. L. QUAR. 66.

[26]51 AM. JUR. 454-455; 4 SUMMERS, *op. cit. supra* note 7, §§ 783, 784.

[27]See cases cited *supra* note 9; 4 SUMMERS, *op. cit. supra* note 7, § 795; THUSS, *op. cit. supra* note 11, §§ 314-315, 447-448.

[28]*Ibid. Accord,* Walker, *loc. cit. supra* note 7, at 1 *et seq.*

[29]See notes 26, 27, and 28 *supra.*

[30]See note 20 *supra;* see cases cited note 19 *supra.*

[31]For a general discussion of "royalties" see: 3 SUMMERS, *op. cit. supra* note 7, §§ 571, 572; Daggett, *Royalty in Louisiana* (1941) 13 MISS. L. J. 323; Blake, *Oil Royalties: A Suggested Criterion* (1941) 13 MISS. L. J. 307.

[32]3 SUMMERS, *op. cit. supra* note 7, §§ 599, 601. *Accord,* La Laguna Ranch Co. v. Dodge, 18 Cal. (2d) 132, 114 P. (2d) 351, 135 A.L.R. 546 (1941).

[33]Blake, *Oil Royalties: A Suggested Criterion* (1941) 13 MISS. L. J. 307, 313. *Accord,* Von Baumach v. Sargent Land Co., 242 U.S. 503, 37 S.Ct. 201, 61 L.Ed. 460 (1916). The royalty-rent theory is discussed *infra* under *Smith County Oil Co.* case.

following both theories of ownership. This has been done despite minor inconsistancies and technical objections.[34] While some states adopting the Ownership in Place Theory have had difficulty in determining the nature of the interest owned under oil and gas royalties,[35] the Texas rule is settled "that the royalty interest created in or reserved to the oil and gas lessor, whether payable in kind, in money representing the value of a share of the oil or gas, or as a flat rental, is an interest in real property and taxable against the owner thereof as a separate item of real estate."[36] Jurisdictions following either of the two theories have held a royalty to be taxable as a separate interest in realty.[37]

A royalty interest may remain in the owner of the surface estate (landowner), or it may be vested in a third person other than the owner of the surface estate or the lessee of the oil and gas. For example, if *A*, as the owner of the surface and the minerals in fee simple, gives a lease of the oil and gas to *B*, reserving a one-eighth royalty in the minerals, two separate interests in the minerals are created. *A*, in this example, could then convey his mineral interest (royalty and reversion) to *C*, and in so doing would transfer the royalty interest already created. The same division could be made if *A* had originally conveyed the fee to the entire mineral estate to *C* and then *C* executed an oil and gas lease to *B*, reserving a one-eighth royalty in the minerals. Under the Ownership in Place or the Qualified Ownership Theories, there would be created in either situation three separate estates—one in the surface and two in the oil and gas. One writer would obtain the same result in this way:

> Why may not the present right to a share of future production of oil and gas be designated and recognized as an incorporeal hereditament in its own name and with its own incidents, apart and distinquishable [sic] from, though of the same dignity in the law as, profits a prendre, rents, ways, annuities and other forms of incorporeal hereditaments?

---

[34] 24 Am. Jur. 599; Blake, *loc. cit. supra* note 33, at 320; Lesar, *Conveyance of Oil Royalties and Mineral Fee Interests in Kansas* (1939) 8 Kan. Bar. J. 241; Walker, *loc. cit. supra* note 7, at 40; Notes (1939) 27 Calif. L. Rev. 200, (1937) 25 Calif. L. Rev. 220, (1935) 13 Tex. L. Rev. 501.

[35] *Ibid.*

[36] 4 Summers, *op. cit. supra* note 7, § 797. *Accord*, see note 9 *supra;* Sheffield v. Hogg, 124 Tex. 290, 77 S.W. (2d) 1021, 80 S.W. (2d) 741 (1935); Thuss. *op. cit. supra* note 11, 140, 447-488; Note (1935) 13 Tex. L. Rev. 501. *Contra,* Rest v. Toole County, 159 P. (2d) 340, 162 A.L.R. 406 (Mont. 1945); *but see* Note (1945) 162 A.L.R. 420.

[37] 51 Am. Jur. 455-456; Notes (1945) 162 A.L.R. 420, (1940) 128 A.L.R. 851, (1936) 101 A.L.R. 884. *Accord,* cases cited *supra* notes 9 and 11; Haglund, *Taxation of Oil and Gas Interest* (1932) 20 Ky. L. J. 224 and 445; 4 Summers, *op. cit. supra* note 7, § 797; *see* Jilek v. Chicago, Wilmington & Franklin Coal Co., 382 Ill. 241, 47 N.E. (2d) 96, 146 A.L.R. 871 (1943).

> Such an interest would be real property if it is given in perpetuity; a chattel real if given in a lease for years. In both cases it is an interest in real property. . . .[38]

The royalty interest, in the above example, whether in *A* or *C*, is generally an interest in realty and subject to taxation as such. Under the Texas view, *A* has a fee simple estate in the surface, *C* possesses a fee simple estate in one-eighth of the oil and gas and a reversionary estate in seven-eighths of the oil and gas,[39] and *B* owns a determinable fee to seven-eighths of the oil and gas.[40] Each of these interests is conveyable, subject to the Statute of Frauds, and has a determinable market value that is generally assessed and taxed separately as realty.[41] A further complication is added to the example if *A* had expressly reserved a fractional interest in the mineral estate and/or if *B* gave a sub-lease of his mineral interests to *D*, clearly reserving to himself a royalty interest in addition to *C's* interest in the mineral estate (sometimes called an "overriding royalty interest"). Although the solution generally depends upon the construction applied to the various instruments involved, the Texas courts have continued to apply the rules of property law to the various fractional interests; the result is that each of such interests is taxable as realty.[42]

---

[38]Levy, *Oil Royalties—A Distinct Species of Property* (1938) 11 So. Calif. L. Rev. 319, 326; *cf.* Adsit, *op. cit. supra* note 16, at 299, 307. For further discussion of royalties see note 31 *supra;* Moses, *The Prescriptibility of Royalties in Louisiana* (1940) 14 Tul. L. Rev. 516; Notes (1937) 25 Calif. L. Rev. 220 and 230, (1944) 19 Notre Dame Lawyer 258. Compare, Union Sulphur Co., Inc. v. Lognion, 26 So. (2d) 845 (La. 1946); Arrington v. United Royalty Co., 188 Ark. 270, 65 S.W. (2d) 36 (1933).

[39]Sheffield v. Hogg, 124 Tex. 290, 77 S.W. (2d) 1021, 80 S.W. (2d) 741 (1935); Hager v. Stokes, 116 Tex. 453, 294 S.W. 835 (1927); Note (1939) 17 Tex. L. Rev. 346. *Contra,* Comment (1942) 5 La. L. Rev. 115.

[40]Texas Co. v. Daugherty, Stephens County v. Mid-Kansas Oil and Gas Co., both *supra* note 9; Haglund *loc. cit. supra* note 37 at 224 and 445. *Accord,* 24 Am. Jur. 497-498: ". . . after a landowner has leased his property for gas and oil purposes, there remain in him three separate and distinct interests: the estate in the surface, the reserved royalty interest, and the possibility of a reverter of the minerals or of the right to extract them. These interests ar commonly regarded as interests in real property, of an inheritable and transferable character . . ."

[41]See cases cited *supra* notes 9, 36, and 40; Macsas v. Fishencord, 190 Okla. 407, 124 P. (2d) 388 (1942); Glassmire, *op. cit. supra* note 7, §§ 26, 97; 3 Summers, *op. cit. supra* note 7, § 543; 4 *id.* § 783.

[42]State v. Quintana Petroleum Co., 134 Tex. 179, 133 S.W. (2d) 112, 128 A.L.R. 843 (1940), *rehearing denied,* 134 S.W. (2d) 1016 (1940), where a 7/32nd interest, which was reserved to the lessor in addition to his one-eighth royalty until the proceeds therefrom aggregated two million dollars, was held to be an interest in realty taxable as such against its owner; Cobb v. Downing, 1 S.W. (2d) 508 (Tex. Civ. App. 1927); Stair v. Smith, 299 S.W. 660 (Tex. Civ. App. 1927); *see* Waggoner Estate v. Wichita County, 273 U.S. 113, 47 S.Ct. 271, 71 L.Ed. 566 (1927). *Accord,* 4 Summers, *op. cit. supra* note 7, at 218: "It is now settled in Texas that the royalty interest created in or reserved to the oil and gas lessor, whether payable in kind, in money representing the value of a share of the oil or gas, or as a flat rental, is an interest in real property and taxable against the owner thereof as a separate item of real estate."

Since the Mississippi Supreme Court has approved and followed the Texas rule as to the landowner's interest in oil and gas, it would be reasonable to suppose that Mississippi would have the same attitude toward royalty interests and the taxation thereof. This would appear particularly true since the constitutional and statutory provisions in each state are similar. The failure of the Mississippi Supreme Court, in the three cases now to be considered,[43] to follow the Texas jurisprudence as to taxation of such fractional interests has led to uncertainty and indecision.

Gulf Refining Company v. Stone, State Tax Commissioner[44]

In the *Gulf Refining Company* case an unsuccessful attack was made on the constitutionality of Chapter 134 of the Laws of 1944. This legislation levies "an annual privilege tax upon every group, acting as a unit, engaged in the business of producing or severing oil for commercial purposes, the tax being six cents per barrel, or 6% of the value, whichever is greater,"[45] and stipulates that the taxed activity shall include anyone owning any royalty or other interest in oil and gas. The pivot on which the case turns is to be found within this opening statement of the court; that is, the tax in question is a *privilege tax,* not a property tax, and is levied against anyone engaged in the *business of producing or severing oil for commercial purposes.*[46] It is upon this basis that this case can be distinguished from past or future ones. This distinction between "privilege tax" and "property tax" is well recognized,[47] and if it had been clearly drawn in the *Gulf Refining Company* case would have prevented some of the difficulties that arose in subsequent decisions.

---

[43]See note 1 *supra.*

[44]197 Miss. 713, 21 So. (2d) 19 (1945).

[45]Gulf Refining Co. v. Stone, State Tax Comm., 197 Miss. 713, 738-739, 21 So. (2d) 19, 20 (1945).

[46]The nature of the tax being levied, aside from the statement of purpose in the body of the act, is clearly stated in this part of the preamble to the Act (Miss. Laws 1944, c. 134): "AN ACT to provide for the raising of additional public revenue by the imposition of a privilege tax relative to oil mined or produced in this state . . ." *Accord,* Large Oil Co. v. Howard, 63 Okla. 143, 163 P. 537, 547 (1917).

[47]Stone v. General Contract Purchase Corp., 193 Miss. 301, 7 So. (2d) 806, 140 A.L.R. 1029 (1942), followed in C.I.T. Corp. v. Stone, 193 Miss. 344, 7 So. (2d) 811, *affirmed,* 317 U.S. 591, 63 S.Ct. 66, 87 L.Ed. 484 (1942), and companion cases. *Accord,* State v. Standard Oil Co. of La., 188 La. 978, 178 So. 601 (1937); Flynn, Welch & Yates v. State Tax Comm., 38 N.M. 131, 28 P. (2d) 889 (1934); State Tax Comm. v. Petroleum Exploration Co., 253 Ky. 119, 68 S.W. (2d) 777 (1933); *see* American Airways v. Wallace, 57 F. (2d) 877 (M.D. Tenn. 1932); Note (1936) 103 A.L.R. 18; 2 C.J.S. 496; 4 SUMMERS, *op. cit. supra* note 7, § 801; 34 WORDS AND PHRASES 489-503; cf. City of De Land v. Fla. Public Service Co., 119 Fla. 804, 161 So. 735 (1935).

It was contended that the act violated section 112 of the Mississippi Constitution on the theory that, oil and gas being property, the tax amounted to a tax on property. The substance of this constitutional provision is that "taxation shall be uniform and equal throughout the state, and that property shall be assessed for taxes under general laws and by uniform rules according, and in proportion, to its true value."[48] In disposing of this section, the court stated:

> . . . Sec. 112 has no application to the taxation of oil and gas, as separate property. In order that property may be taxable under that section it must be capable of assessment, which means that when *corporeal* property is involved it must be capable (1) of inspection, and after inspection of estimate and appraisal, and (2) of being made subject to a tax lien, and to a sale and delivery of the identical property, and not some other, to make the tax money in case of default in payment.[49] (Italics added)

If it is conceded that oil and gas possess both characteristics mentioned by the court (which the court refused to do) the constitutional provision still is not applicable because the act provides for a *privilege tax*. If a mineral interest is "corporeal" property (which is consistent with the Mississippi decisions that the lessee has a determinable fee in the oil and gas), the two prerequisites of the court in the quotation immediately above presuppose that this mineral interest could not be subjected to taxation under any other theory. This assumption fails to consider those cases in which the market value of mineral interests is used for tax valuation purposes,[50] and fails to give effect to certain Mississippi statutes.[51] The market value placed on such mineral interests has been used as a basis for ad valorem assessment prior to the production of oil or gas.[52] Most states, whether followers of the qualified or absolute theory, assess the interest of the lessor and lessee separately as realty in addition to any privilege, severance, or production tax on the same mineral interest.[53]

---

[48]Gulf Refining Co. v. Stone, 197 Miss. 713, 740, 21 So. (2d) 19, 20 (1945).

[49]*Ibid.*

[50]Stone v. Interstate Natural Gas Co., 103 F. (2d) 544 (C.C.A. 5th, 1939), *cert. granted,* 307 U.S. 620, 59 S.Ct. 1047, 83 L.Ed. 1499, *affirmed,* 308 U.S. 522, 60 S.Ct. 292, 84 L.Ed. 422, *rehearing denied,* 308 U.S. 639, 60 S.Ct. 381, 84 L.Ed. 530 (1939); Urshel v. Stone, 21 So. (2d) 466 (Miss. 1945); State Tax Commission v. Love Petroleum Co., 197 Miss. 277, 19 So. (2d) 923 (1944); 51 AM. JUR. 658-660; Notes (1945) 160 A.L.R. 684, (1933) 84 A.L.R. 1310.

[51]MISS. CODE ANN. (1942) §§ 9769, 9770.

[52]Raydure v. Estill County, 183 Ky. 84, 209 S.W. 19, 23 (1919), where the court stated: "We are unable to perceive any sound reason why an oil lease that may be a subject of barter and sale should not be taxed [as realty], if it has a cash value and will bring something at a fair voluntary sale." *Accord,* 4 SUMMERS, *op. cit. supra* note 7, § 799; THUSS, *op. cit. supra* note 11, § 316.

[53]State of Texas v. Quintana Petroleum Co., 134 Tex. 179, 133 S.W. (2d) 112, 134 S.W. (2d) 1016, 128 A.L.R. 843 (1940); Gulf Refining Co. of La. v. McFarland, 154 La. 254, 97 So. 433 (1923); Notes (1930) 71 A.L.R. 256, 267, (1928) 59 A.L.R. 701; 51 AM. JUR. 342, 345; 4 SUMMERS, *op. cit. supra* note 7, § 801.

One of the arguments[54] advanced against the constitutionality of the act was that it came within the rule announced in *Thompson v. McLeod*.[55] The *Thompson* case applied section 112 of the Mississippi Constitution in declaring invalid a statute which imposed a gross annual "privilege tax or occupation fee" for the right to extract turpentine from standing trees, the license being one-fourth of one cent each year for each cup or box.[56] The court failed to draw a distinction between *property* and *privilege* taxes and held the turpentine tax to be unconstitutional. The case of *Thompson v. Kreutzer*[57] was relied on by the court in reaching its conclusion. The *Kreutzer* case was a successful attack on a statute[58] which levied an "annual privilege tax, or occupation fee of twenty cents per acre upon each person . . . pursuing the business of buying, owning or holding more than one thousand acres of timber land"; provided, however, that land taxed with a five cent acreage tax could have this levy deducted from the tax imposed by the act.[59] In the *Kreutzer* case the court properly found that the tax was imposed directly on the right of ownership and was a tax on property; such a tax violated the constitutional requirement that property be taxed in proportion to its value. Under the statute declared unconstitutional in the *McLeod* case, one could own several thousand acres of pine trees and never pay the tax if turpentine was not being produced; but, when production commenced an annual privilege tax or occupation fee of one-fourth of one cent each year for each cup or box would be levied. In the *Kreutzer* case, on the other hand, the tax was directed purely at the ownership of the land and not at the production of something which would result from such ownership. Although the majority of the court in the *Gulf Refining Company* case did not regard the *McLeod* case as controlling its decision, the court did not take this opportunity to distinguish between *property* and *privilege* taxes and overrule the *McLeod* case. This failure is regrettable. An examination of

---

[54]It was also argued that the ad valorem exemption in the act was an effort to levy a severance tax in lieu of an ad valorem tax, which could not be done under Chicago, R.I. & P.R.Co. v. Robertson, 122 Miss. 417, 84 So. 449 (1920). This case was found not to be in point, and it is not discussed in this Note.

[55]112 Miss. 383, 73 So. 193, L.R.A. 1918C 893, Ann. Cas. 1918A 674 (1916). An earlier case, along this line, of Board of Sup'rs of Hancock County v. Imperial Naval Stores, 93 Miss. 822, 47 So. 177, 17 L.R.A.(N.S.) 693, 136 Am. St. Rep. 561 (1908) is also subject to objection, and should be limited to its facts and not compared with oil and gas leases. *Contra,* Miller v. Michigan State Apple Comm., 296 Mich. 248, 296 N.W. 245 (1941) and Kull v. Michigan State Apple Comm., 296 Mich. 262, 296 N.W. 250 (1941), 16 NOTRE DAME LAWYER 386, 7 U. CHI. L. REV. 797, where a privilege tax was levied on the production of apples and held constitutional; State v. Parker, 5 Ala. App. 231, 59 So. 741 (1912), where a tax on oysters taken from a private bedding ground was held not to be a tax on property.

[56]Miss. Laws 1912, c. 110.

[57]112 Miss. 165, 72 So. 891 (1916).

[58]Miss. Laws 1912, c. 112.

[59]Thompson v. Kreutzer, 112 Miss. 165, 166, 72 So. 891 (1916).

the *McLeod* case shows that it is not supported by the authorities,[60] and that the fear of double taxation expressed by the court is not justified.[61] The partially dissenting opinion in the *Gulf Refining Company* case relied on the *McLeod* case for holding the oil and gas privilege tax to be invalid as to the lessor because it constituted double taxation. If the *McLeod* case be authority for so holding, it should be overruled, or at least restricted to its particular facts. Since it is generally recognized that standing timber is taxable separately as realty,[62] it follows that any reasonable privilege or excise tax on the separate estate in the timber should be sustained. The Texas court,[63] as have other state courts,[64] recognizes that ad valorem and occupation taxes on the same interest in land do not constitute double taxation, and has stated:

> . . . although this law imposes an occupation tax upon the oil producers who pay an ad valorem tax upon the real estate producing oil, it does not constitute double taxation not permitted by the law, as it is within the authority of the legislature to impose an ad valorem tax on the oil-producing property of appellants and an occupation tax for the use of this property in the production of oil.[65]

The court in the *Gulf Refining Company* case in stating that "there is no present statute by which an ad valorem tax could be enforced against oil as separate property"[66] fails to consider or mention section 9770 of the Mississippi Code of 1942. This statute provides that whenever any mineral estate is "owned separately and apart from . . . the right and interest owned in the surface of such real estate . . . all such

---

[60]The authorities cited by the court are distinguishable in facts and law. The distinction is one of *privilege* and *property* taxes. The Federal cases cited are not in point. They deal with income tax provisions of tariff act, tax on rents from realty and income from municipal bonds, state tax on imports, and a tax on carriages. See note 47 *supra*.

[61]Barwise v. Sheppard, 299 U.S. 33, 57 S.Ct. 70, 81 L.Ed. 23, *rehearing denied*, 299 U.S. 622, 57 S.Ct. 299, 81 L.Ed. 458 (1936); Note (1930) 71 A.L.R. 256; 51 Am. Jur. 342, 345.

[62]Caston v. Pipe Lumber Co., 110 Miss. 165, 69 So. 688 (1915); France v. Deep River Logging Co., 79 Wash. 336, 140 P. 361, 362, Ann. Cas. 1916A 238 (1914); Fox v. Pearl River Lumber Co., 80 Miss. 1, 31 So. 583 (1902); Note (1908) 17 L.R.A. (N.S.) 694; 51 Am. Jur. 456.

[63]Producers' Oil Co. v. Stephens, 44 Tex. Civ. App. 327, 99 S.W. 157 (1907), approved in Texas Co. v. Stephens 110 Tex. 628, 103 S.W. 481 (1907); see cases cited *supra* notes 9, 21.

[64]Ohio Tax Cases (Ohio River & W. R. Co. v. Dottey), 232 U.S. 576, 34 S.Ct. 372, 58 L.Ed. 737 (1913); Shaffer v. Carter, 252 U.S. 37, 40 S.Ct. 221, 64 L.Ed. 445 (1920); Heirs v. Mitchell, 95 Fla. 345, 116 So. 81 (1928); Stepp v. Pike County Board of Suprs, 194 Ky. 176, 238 S.W. 408 (1922); Ft. Smith v. Scruggs, 70 Ark. 549, 69 S.W. 679, 58 L.R.A. 291, 91 Am. St. Rep. 100 (1902).

[65]Producers Oil Co. v. Stephens, 44 Tex. Civ. App. 327, 99 S.W. 157, 158-159 (1907), holding approved in Texas Co. v. Stephens, 100 Tex. 628, 103 S.W. 481 (1907).

[66]Gulf Refining Co. v. Stone, 197 Miss. 713, 741, 21 So. (2d) 19, 21 (1945).

interest shall be assessed and taxed separately from such surface right and interests . . . and shall be sold for taxes in the same manner and with the same effect as other interests in real estate . . ." Although this section was not directly pertinent to the decision of the case, the statement that no such statute exists seems to have been offered in justification for the holding. The fact that the act under consideration in the *Gulf Refining Company* case exempts those paying the privilege tax from ad valorem taxes indicates that the legislature considered such interests to be subject to an existing tax. If the court had reached the same result by holding the tax law valid as a privilege tax, without reference to the ad valorem taxation of mineral interests, then section 9770 would have enabled the assessment for ad valorem taxes of all mineral interests prior to production.[67] But the legislature made the task even easier by expressly exempting those paying the privilege tax from ad valorem taxes; although, as pointed out in the partial dissent by Mr. Justice Roberds, "the legislature had the power to impose the tax without the exemption."[68]

The difficulty the court in the *Gulf Refining Company* case had in applying the privilege tax under consideration therein to the owner of the royalty interest further illustrates their reluctance to view the act as a *privilege* tax entirely separate and distinct from a *property* tax. Not only has the Texas court approved a statute practically identical to the one under consideration, as against similar objections, but the holding has been affirmed by the United States Supreme Court.[69] States following both the qualified and the absolute ownership theories have approved privilege taxes on royalty interests without finding them to be double taxation.[70] Overriding royalty interests also have been found taxable under the same conditions.[71]

---

[67]See the Cumulative Pocket Part to 4 SUMMERS, *op. cit. supra* note 7, § 797 where Professor Summers discusses section 9770 (MISS. CODE ANN. 1942) and the Act under consideration in the *Gulf Refining Company* case, respectively, as follows: "In Mississippi it is apparent that an oil and gas lessor's royalty interest is taxable as real property under an act passed in 1930 [section 9770], although a statute enacted in 1944 [now under consideration], levying a production tax on oil and gas producers, including royalty owners, provides that the tax levied under the statute shall be in lieu of the ad valorem tax assessed against royalty owners under the earlier statute."

[68]Gulf Refining Co. v. Stone, 197 Miss. 713, 746, 21 So. (2d) 19, 21 (1945).

[69]Barwise v. Sheppard, 299 U.S. 33, 57 S.Ct. 70, 81 L.Ed. 23, *rehearing denied*, 299 U.S. 622, 57 S.Ct. 299, 81 L.Ed. 458 (1936); Group No. 1 Oil Corp. v. Sheppard, 89 S.W. (2d) 1021 (Tex. Civ. App. 1935); Trustee of Cook's Estate v. Sheppard, 89 S.W. (2d) 1026 (Tex. Civ. App. 1935). *But see*, Cole v. Pond Fork Oil & Gas Co., 35 S.E. (2d) 25, 160 A.L.R. 970 (W. Va. 1945), *cert. denied*, 66 S.Ct. 147, 90 L.Ed. 61 (1945); *see* Note (1945) 160 A.L.R. 980.

[70]See cases cited *supra* notes 61, 63, 64; Note (1930) 71 A.L.R. 267; 51 AM. JUR. 342.

[71]Wilcox v. Hull-Daisetta Independent School Dist., 95 S.W. (2d) 490 (Tex. Civ. App. 1936); Robinson v. Jones, 119 Kan. 609, 240 P. 957 (1925); *see* Electra Independent School Dist. v. Waggoner, 140 Tex. 483, 168 S.W. (2d) 645 (1943).

In summary, the sole issue that should have been considered in the *Gulf Refining Company* case was whether or not the state could constitutionally collect a privilege tax from the lessor and lessee of oil producing estates. The following language of the court, not necessary to the determination of that issue, has added to the difficulty in understanding the next two cases to be considered:

> There is not to be gathered from what has been said herein that an oil or gas lease is not separately assessable, ad valorem. Such a lease or conveyance with the right of entry is an estate in land, subject to ad valorem taxation, but not including the oil or gas as a separate item of valuation . . . . What we are saying is that any supposed quantity or quality oil under the surface is not to be taken into consideration as a specific item of valuation such for instance as is done with visible improvements on the land . . .[72]

Smith County Oil Company v. Board of Supervisors of Simpson County[73]

The Smith County Oil Company, owner of the entire mineral estate but not the surface estate in a large tract of land, executed an oil and gas lease of the minerals to the Hunt Oil Company, reserving a one-eighth royalty. Thereafter, the one-eighth interest retained by the Smith County Oil Company under the lease was assessed for ad valorem taxes. In the *Smith County Oil Company* case the Company was successful in having this assessment set aside as being unauthorized. Although this case involved only the ad valorem assessment of the royalty interest in a mineral estate, the court, in reaching their illogical result, relied on dictum in the *Gulf Refining Company* case, which involved the constitutionality of a privilege tax on oil production (including the royalty interests). The *only* authority cited by the majority was the *Gulf Refining Company* case, which, it is submitted, is not an authority for invalidating the assessment now under consideration since the two cases respectively concern *property* and *privilege* taxes.

The court declined to determine the nature of the estate remaining in the Smith County Oil Company after it executed a lease of the minerals, although a fee in the minerals (prior to the lease) is acknowledged by implication in recognizing the existance of an estate separate and distinct from the surface estate. This timely and important question was not considered because:

> What was left to the lessor, the Smith County Oil Company, and all that was left, was either (1) the ownership of the entire interest in the oils and other minerals in place under the

[72]Gulf Refining Co v. Stone, 197 Miss. 713, 742-743, 21 So. (2d) 19, 21 (1945).
[73]25 So. (2d) 457 (Miss. 1946).

> surface, or else (2) the ownership of an eighth interest therein, or else simply a royalty of an undivided one eighth when, but not until, discovered and raised to the surface. It is not necessary here to decide which of these three results was produced, for if either of the first two, then what the lessor had left was oils and minerals under the surface where it could not be inspected and after inspection estimated and appraised . . . If all that appellant [lessor] had left was a royalty in the minerals when produced this does not become assessable ad valorem until produced and brought to rest upon the surface.
>
> All this was decided in Gulf Refining Co. v. Stone, Miss., 21 So. 2d 19 . . .[74]

Two erroneous conclusions were reached in the latter part of the above statement. The first of these two conclusions is predicated on the assumption that even if the lessor's interest is realty it cannot be assessed because it is not capable of inspection and appraisal. As has been stated, the assessment could be based on what that royalty interest might sell for when a willing buyer was purchasing from a willing seller. The facts of this case definitely are within the operation of section 9770, mentioned above, but this section is cited only in the dissent of Mr. Justice Roberds. The statutory provision clearly provides for ad valorem assessment and should be followed. When the constitutional requirements are met by a taxing statute, and the rate and mode of assessment are nondiscriminatory, and the application is uniform, it generally is given effect by the courts. Section 9770, however, has not received this treatment. Even admitting that the court's test is best from an administrative standpoint (*sed quaere*), the legislature is the body whose function it is to determine the method of assessing. If an incorporeal interest can be assessed without being inspected, why apply a different rule to a corporeal interest? If there is no constitutional provision preventing assessment under the statute, by what authority does the court disregard the combined effect of section 9769 and 9770?[75] Since the former statute requires "the owner, agent, or person having possession . . . of any lands, to render a list of all lands owned . . . and lands shall be assessed according to its true value,"[76] what is the source of this rule that the property must be subject to inspection, if it is corporeal? Although these statutes authorize an assessment, the court by judicial legislation has imposed an impossible prerequisite to assessment of interest in mineral estate. The weight of authority favors separate assessment of the lessor's and lessee's interests for ad valorem taxes.[77]

---

[74]*Ibid.*

[75]Miss. Code Ann. (1942).

[76]Miss. Code Ann. (1942) § 9769.

[77]Waggoner Estate v. Wichita County, 273 U.S. 113, 47 S.Ct. 271, 71 L.Ed. 566 (1926); McLean v. State, 181 S.W. (2d) (Tex.Civ.App. 1944); Electra In-

The second statement of the court, referred to above, considers a royalty interest as not becoming assessable ad valorem until produced and brought to rest upon the surface. This view fails to distinguish a "royalty interest" before production from that interest after production has commenced. One writer has drawn these distinctions:

> For the term *royalty* is used in three distinct senses: as an object of property rights, as respecting quantum of the estate therein, and as the actual payment made or to be made to the holder of a royalty interest . . . In respect of duration, the royalty holder may enjoy a real property estate, as where the extent of his interest is fee simple or fee qualified, or he may be vested with a personal property estate, as where the extent of his interest is for a term of years. The actual payment of accrued royalty is, of course, personal property. To further emphasize the importance of qualifying the term *royalty*, it may be said that in the objective sense royalty is always real property, that in the duration sense royalty may be either real or personal property, and that in the payment sense royalty is always personal property.[78]

The position taken by the court also fails to consider a royalty as a species of real property. The general rule, and one that is consistent with the Qualified Ownership and Ownership in Place Theories, is that royalty is rent:

> The American authorities appear, in general, to have followed the English view that mining royalties properly possess the legal incidents of rent. The United States Supreme Court has held that under a lease by which the owner or lessor grants to the lessee the privilege of mining and operating the land in consideration of a certain stipulated royalty on the mineral produced, whatever is paid for the occupation and use of the premises, whether it be in money or kind, is equally in substance rent, and under such circumstances royalties reserved are rentals.
>
> . . . All forms of rent at common law were classed as incorporeal hereditaments, real property in the objective sense, and in theory represented a right to share in profits of the land. If the oil and gas lease is for a term of years, the royalty reserved is analogous to rent service, the landowner retaining a reversionary interest out of the estate granted; if the oil and

---

dependent School Dist. v. Waggoner, 140 Tex. 483, 168 S.W. (2d) 645 (1943); Bashara v. Saratoga Independent School Dist., 139 Tex. 523, 163 S.W. (2d) 631 (1942); Prince Bros. Drilling Co. v. Fuhrman Petroleum Corp., 150 S.W. (2d) 314 (Tex.Civ.App. 1942); State of Texas v. Quintana Petroleum Co., 134 Tex. 179, 133 S.W. (2d) 112, 136 S.W. (2d) 1016, 128 A.L.R. 843 (1939); Notes (1939) 128 A.L.R. 851, (1928) 59 A.L.R. 701; People *ex rel.* Carrell v. Bell, 237 Ill. 332, 86 N.E. 593, 19 L.R.A. (N.S.) 746, 15 Am. Cas. 511 (1908); Consolidated Coal Co. v. Baker, 135 Ill. 545, 26 N.E. 651, 12 L.R.A. 247 (1891); 51 AM. JUR. 454, 455; 4 SUMMERS, *op. cit. supra* note 7, §§ 786, 796. See strange results reached in Rathburn v. Williams, 154 Kan. 601, 121 P. (2d) 243 (1943).

[78]Blake, *Oil Royalties: A Suggested Criterion* (1941) 13 MISS. L. J. 307, 322.

> gas lease is for a term of years and "so long thereafter as oil and gas is produced"—a limitation generally recognized as vesting in the lessee a determinable fee estate either in the *profit a prendre* or in the oil and gas in place (as the case may be)—the royalty reserved is analogous to rent charge, the landowner retaining as to the estate granted but a possibility of reverter.[79]

Considering a royalty interest, prior to actual payment, as a rent (an incorporeal hereditament that is regarded as realty), such an interest should be subject to ad valorem assessment under the Mississippi statutes.[80] The essential nature of the royalty interest remains the same whether it is called corporeal or incorporeal.[81] Why should a classification of this sort affect the determination of whether it *can* be taxed, as distinguished from that of whether the Legislature *has* taxed it? The classification would be without difficulty if Mississippi would continue to apply the Texas view, mentioned above, to a royalty interest. In Texas the owner of a royalty has ownership of one-eighth of the oil and gas in place, and this interest is taxed to such owner separately as realty.[82]

Despite the above authorities that the lessor's royalty is an interest in realty, considered by most courts as a rent, the following language in the *Smith County Oil Company* case should be considered:

> . . . that enough was also there said [*Gulf Refining Company* case] to indicate that the method by which to assess a lease such as is here presented, which gives the lessee the sole right to the surface use, is to assess the lease as an entirety to the owner thereof, instead of attempting to split it into fractional parts as was attempted here, and this without regard to the question whether such a lease does or does not give to the lessee any present ownership in the minerals in place and which may or may not be under the surface.[83]

This language makes it appear that the mineral estate might have been assessed against the Smith County Oil Company before it executed the lease (since it had a right to the surface use), and that since the execution of the lease the mineral estate can only be assessed, if at all, as an entirety against the lessee. The strange anomaly is presented of the owner of a part of a mineral estate not being subject to assessment while the owner of the larger part of the minerals can be assessed for the entire mineral estate. How is it that an inspection and appraisal can be made in the one case and not in the other? Why is it that one

---

[79] *Id.* at 313 and 320.

[80] Miss. Code Ann. (1942) §§ 9769, 9770, 9789, 9790.

[81] 3 Summers, *op. cit. supra* note 7, § 572; Notes (1941) 131 A.L.R. 1371, (1934) 90 A.L.R. 770. *Accord,* see notes 31, 37, and 38 *supra;* 24 Am. Jur. 599.

[82] See note 36 *supra. Accord,* see notes 39, 42 *supra.*

[83] Smith County Oil Co. v. Board of Supervisors of Simpson County, 25 So. (2d) 457, 458 (Miss. 1946).

can be assessed for that which he does not own while another cannot be assessed because of the smallness of his interest? Has the Legislature so provided?

Assuming that the Smith County Oil Company, before making the lease, was the owner of the entire mineral estate in fee, it had a right to use the surface in development of the minerals and this estate had a market value which would enable a fair valuation and assessment. Under the Texas rule, when the Smith County Oil Company executed the oil and gas lease, it conveyed seven-eighths of its interests in the mineral estate to the lessee, retaining a one-eighth interest in the mineral estate in fee and seven-eighths reversionary interest. Whatever estate the Smith County Oil Company had had before the lease, it now had only one-eighth as much and should be assessed accordingly. The same rule and reasoning should be applied to the purchaser of the seven-eighths interest. The Mississippi Supreme Court did not follow this reasoning. Assume that instead of giving a lease to seven-eighths of the minerals the Smith County Oil Company had sold a half interest in the mineral estate. If the entire estate could have been assessed to the Smith County Oil Company, can there be a reason for not assessing one-half of the mineral estate to them? If not, why not assess the one-eighth interest?

In many states "overriding royalties" are taxable as realty,[84] *a fortiori* a one-eighth royalty interest would be taxable as should any larger or smaller fractional interest. This is the better rule and the one generally adopted.[85]

Stern v. Parker[86]

In the *Stern* case, Parker had purchased the land in question from the State of Mississippi after it had been sold for delinquent taxes for the fiscal year 1936. The assessment of the entire tract, at the time of the sale of the land to the state for taxes, was in one L. R. Livingston. There was no separate assessment of the mineral estate. Stern, and others, claimed a one-half interest in all of the minerals in the land through

---

[84]McLean v. State, 181 S.W. (2d) 725 (Tex.Civ.App. 1944); Prince Bros. Drilling Co. v. Fuhrman Petroleum Corp., 150 S.W. (2d) 304 (Tex.Civ.App. 1941); Mt. Sterling Oil & Gas Co. v. Ratliff, 127 Ky. 1, 104 S.W. 993 (1907); State v. Quintana Petroleum Co., *supra* note 42; *cf.* Buttram v. Gray County, 62 F. (2d) 44 (C.C.A. 5th, 1932), *cert. denied*, 289 U.S. 728, 53 S.Ct. 525, 77 L.Ed. 1478 (1933). *Accord*, see notes 11, 71, *supra*.

[85]Baird's Appeal, 334 Pa. 410, 6 A. (2d) 306 (1939); Commonwealth v. Garrett, 202 Ky. 548, 260 S.W. 279 (1924); Note (1940) 128 A.L.R. 851; see note 11 *supra; cf.* Tennant v. Dunn, 110 S.W. (2d) 53 (Tex.Comm.App. 1937), (1938) 16 TEX. L. REV. 595.

[86]25 So. (2d) 787 (Miss. 1946), *sug. error overr.*, 27 So. (2d) 402 (Miss. 1946).

a reservation and exception made in a deed from them to third persons in 1902. Stern's contention was that the forfeited tax sale did not in any manner affect his right and interest, and that his interest in the mineral estate was subject to back taxation for a period of fifteen years. The court, in line with those authorities which hold that a tax sale extinguishes any easement that is not separately assessed[87] and that a tax sale extinguishes the reversionary interest when not assessed to such interest,[88] denied Stern's contention. The court recognized the possibility of separate estates in land, but stated:

> The fact that the tax assessor did not assess the sub-surface estate of appellants [Stern] is not available to them to defeat the claims of appellee [Parker] here. It was their primary duty to protect themselves, the governmental rights, and their fellow citizens . . . . since the land was already entirely assessed, and was on the assessment roll, it had not escaped taxation, and hence was not entitled or subject to back assessment, either wholly or partially, after it had been sold for defaulted taxes. The land had appeared on the assessment rolls by its definite government description . . . This was sufficient to carry with it the title of the entirety of the land, both above and below the surface for the reasons stated, and in harmony with our statutes and decisions.[89]

This statement shows the reluctance of the court to follow to its natural and logical conclusion the theory that a mineral estate is separate from the surface estate. The holding implies, however, that Stern could have protected his one-half interest in the mineral estate by having it assessed to him separately and paying the taxes thereon during the past fifteen years. Under the *Smith County Oil Company* case, on the other hand, it is doubtful that Stern would have had such a right if he had reserved a one-eighth interest in the minerals, and it is equally as doubtful that his position is improved by having a one-half interest in the minerals. The owner of a fractional interest in a mineral estate is placed in the undesirable position of not being able to have such interest assessed for taxes and, at the same time, of losing his interest by sale of the surface estate for taxes. The results are contrary to the better rule.[90]

---

[87]Jackson v. Ashley, 189 Miss. 818, 199 So. 91 (1940), (1941) 13 MISS. L. J. 653; *see* Comment (1941) 16 WASH. L. REV. 36; *cf.* Rathbun v. Williams, 154 Kan. 601, 121 P. (2d) 243 (1942).

[88]Eureka Lumber Co. v. Terrell, 48 So. 628 (Miss. 1909); Hazlip v. Nunnery, 29 So. 821 (Miss. 1901); Note (1934) 75 A.L.R. 416, 425; 4 TIFFANY, REAL PROPERTY (3d ed. 1939) § 1248. *But see* State v. Fawkes, 210 Minn. 587, 299 N.W. 666 (1941), (1942) 42 COL. L. REV. 159, 26 MINN. L. REV. 413.

[89]Stern v. Parker, 25 So. (2d) 787, 790-791 (Miss. 1946), *sug. error overr.*, 27 So. (2d) 402 (Miss. 1946).

[90]See notes 31, 37, 38 *supra*. When the Ownership in Place theory of oil and gas, which Mississippi has adopted, is applied to statutes like sections 9769 and 9770, MISS. CODE ANN. (1942), a result contrary to the *Stern* case is reached in

The court, for the first time in any of the three cases under consideration, refers with approval to section 9770.[91] Since the court now finds in this section authority for requiring the owner of one-half of the mineral estate to have his interest assessed, should it not also have found in it authority to authorize the assessment of a smaller interest in the mineral estate against its owner? The distinguishing factors between the *Stern* case and the *Simpson County Oil Company* case, when viewed in this light, are mostly technical and merely a matter of fractional amounts. The subject-matter of both and the nature of the interests involved are such that it is desirable to have a uniform rule applicable to all interests in mineral estates despite the fractional amount of such interest.

The contention on suggestion of error was that although sections 9789, 9790, 9769, and 9770[92] apparently provide for separate assessment of the mineral interest in question, such an assessment was not possible (apparently because of the court's dictum in the *Gulf Refining Company* case and the holding in the *Smith County Oil Company* case). The court found this argument to be fallacious, and stated:

> Undoubtedly it was the purpose of Section 9770, Code 1942, to allow the assessments of the separate interests therein mentioned to be so made as to relieve the owners of such interest of any concern or responsibility as to any other interest in the described parcel of land . . .[93]

A Statutory Solution[94]

The 1946 session of the Mississippi Legislature levied a "mineral documentary tax" (transfer tax) upon the filing of every leasehold or royalty interest in and to any *non-producing* oil, gas, or other minerals in lieu of an ad valorem tax on such non-producing interests. Provision is made for exemption from ad valorem taxes all such interests created prior to the passage of the act which are owned separately and apart from the surface by paying the same tax that is to be paid on instruments filed after the effective date of the act. The tax is predicated on the number of "mineral acres" or "royalty acres" conveyed. The number of such acres is determined by multiplying the aggregate acreage described in the instruments by the fractional interest conveyed, excepted,

---

most states. This is true despite the ownership theory adopted in the state as to the landowner's interest in oil and gas, see notes 11, 12, 18 *supra*. This is particularly true of Texas, see note 9 *supra*. *Accord*, 51 AM. JUR. 454, 455, 456, 938; 61 C.J. 180 n. 74 and 79, 1301; Note (1931) 75 A.L.R. 434, 435.

[91] MISS. CODE ANN. (1942).

[92] *Ibid.*

[93] Stern v. Parker, 27 So. (2d) 402, 403-404 (Miss. 1946).

[94] Miss. Laws 1946, c. 409.

or reserved. The amount of the tax is determined as follows: on all instruments conveying, transferring, excepting, or reserving a mineral or royalty interest for a primary term of ten years or less, three cents per mineral acre; if the primary term is more than ten years and not exceeding twenty years, six cents per mineral acres; if the primary term is more than twenty years, eight cents per mineral acre.[95]

The owners of existing interests can obtain the ad valorem exemption upon complying with the conditions precedent set forth in the act. This election makes possible the continued application of the *Smith County Oil Company* and *Stern* cases to many non-producing mineral estates. The new statute also provides that any sale for taxes of the surface or of the remainder of the fee shall not affect the interest exempted by the act. This provision may prevent in the future controversies of the type illustrated by the *Stern* case.

The constitutionality of the act already has been questioned in *Mississippi Power & Light Co. v. Love, Chancery Clerk, et al.*[96] In the lower court, Chancellor Montgomery held the act to be constitutional.[97] In this case one of the defendants was the owner of the separate mineral estate under a tract of 643 acres and had applied under the said act for an exemption from taxation of his non-producing mineral interest, tendering the amount due under the act. Chancellor Montgomery, in discussing the social and economic justifications for the act, referred to the three cases under consideration herein and found that the *Gulf Refining Company* and *Smith County Oil Company* cases "had stripped the severed mineral interests of any potential value assessable under Section 9770 of the 1942 Code" of Mississippi.

The main attack, among others, against the act came within these general grounds: (1) the act violates the Fourteenth Amendment of the Constitution of the United States and sections 14 and 112 of the Mississippi Constitution in that it is arbitrary and unreasonable, and discriminates against owners of other property subject to ad valorem taxation; (2) the act creates an exemption from ad valorem taxation of mineral interests created prior to the passage of the act on payment of the tax, without relation to the valuation of such property, and is in ef-

---

[95]*Ibid.* The "documentary tax" levied by this act is in addition to, and is not to be confused with, the regular recording fee charged by the Chancery Clerk under section 3922, MISS. CODE ANN. (1942).

[96]Mississippi Supreme Court, November 11, 1946 (not yet reported). The quotations from the majority and the dissenting opinions used in this Note are from a carbon copy of the opinion delivered by the Mississippi Supreme Court.

[97]Chancery Court of Yazoo County, Miss. (Docket no. 10,201), September 27, 1946. The quotation from the Chancellor's opinion is from a carbon copy of the record.

fect, although not so called, a single, acreage tax substituted for the annual ad valorem taxes on said property—as such it violates section 112 of the Mississippi Constitution; and (3) the act imposes on all future conveyances of non-producing mineral interests a property tax, in lieu of ad valorem taxes, which is calculated upon the basis of mineral acres conveyed and therefore violates section 112 of the Mississippi Constitution.

The appeal of the *Mississippi Power & Light Company* case raised the questions of the constitutionality of both the "documentary tax" and the ad valorem exemption provision of the act.

The basic question in determining the constitutionality of the tax provision (and this should have been the principal question in the *Gulf Refining Company* case) is whether the "documentary tax" is a privilege tax or a property tax. Chancellor Montgomery, in deciding that it is a *privilege tax,* cited with approval a Mississippi case which draws a distinction between privilege and property taxes, and which in making such distinction refers to the *McLeod* and *Kreutzer* cases, as follows:

> "The distinction between a property tax and a license or privilege tax imposed for revenue is that the function of the property tax is to raise revenue by virtue of the fact that the property is within the jurisdiction of the taxing power, and no condition or restriction is imposed thereby upon the use of the property taxed, while *the license or privilege tax,* even though also passed to raise revenue, *is imposed upon the right to exercise a privilege,* and its payment is made a condition to the exercise, or continuance in the exercise of the privilege, business, or vocation involved . . . . If in its nature a tax is a license or privilege tax, it does not become a property tax simply because it is proportioned in amount to the value of the property used in connection with the privilege which is enacted." 33 AM. JUR., "License", section 3 . . . In Thompson v. Kreutzer, 112 Miss. 165, 72 So. 891 . . . the tax on the ownership of property, without reference to any activity in connection with it. In Thompson v. McLeod, 112 Miss. 383, 73 So. 193, L.R.A. 1918C, 893, Ann. Cas. 1918A, 674, *a border-line case,* the activity taxed (extracting turpentine from trees grown on land) was one of the rights inherent in the ownership of the land, and therefore the tax was held to be in effect, a tax on the land itself. If it be said that this case departed from the rule above announced, we must decline to build on it, and will confine it to its own facts.[98] (Italics added)

---

[98]Stone v. General Contract Purchase Corp., 193 Miss. 301, 310; 7 So. (2d) 806, 808 (1942).

Applying the above test, if it is the "right to exercise a privilege" that is being taxed, the act levies a *privilege* tax and is constitutional.[99] If the "documentary tax" is a *property* tax, since no "condition or restriction" (privilege tax) is imposed upon the use of the property taxed, the act clearly would be unconstitutional.[100] It is submitted that the better reasoning favors the "documentary tax" being a *privilege* tax.

The act also could be found unconstitutional as a property tax if it is the privilege of owning the mineral interest conveyed that is taxed. This was decided with respect to a similar act in the *Kreutzer* case, where the court stated:

> A tax on a thing is a tax on all its essential attributes; and a tax on an essential attribute of a thing is a tax on the thing itself. So that, a tax on a thing owned is necessarily a tax on the right of ownership thereof; and a tax on the right of ownership of a thing is necessarily a tax on the thing itself. No definition of property can be framed which does not include the right of ownership. Consequently, no tax can be imposed on the right of ownership which is not also a tax on property.[101]

The Kreutzer case, however, can be distinguished on the basis that the "privilege" tax there levied on the business of holding more than one thousand acres of timber land was an *annual* tax; whereas the "documentary tax" is levied on each separate conveyance as such is made.

On November 11, 1946, the Mississippi Supreme Court, in ruling on the *Mississippi Power & Light Company* case, refused to consider the constitutionality of the "documentary tax" provisions of the act, because the Company was not shown to be a lease holder and was not, therefore, obligated to pay the documentary transfer tax. The court found that the exemption provision of the act was constitutional,[102] and that

---

[99]Stone v. General Contract Purchase Corp., 193 Miss. 301, 7 So. (2d) 806 (1942); Community Public Service Co. v. James, 167 S.W. (2d) 588 (Tex.Civ.App. 1942); Postal Telegraph & Cable Co. v. Robertson, 116 Miss. 204, 76 So. 560 (1917). *Accord,* 51 Am. Jur. 53, 60-65, 112, 113, 1070; Note (1936) 103 A.L.R. 101, 103.

[100]Dawson v. Kentucky Distilleries and Warehouse Co., 255 U.S. 288, 41 S.Ct. 272, 65 L.Ed. 638 (1920); Barnes v. Jones, 139 Miss. 675, 103 So. 773 (1925); Thompson v. McLeod, Thompson v. Kreutzer, both discussed *supra* under *Gulf Refining Company* case.

[101]Thompson v. Kreutzer, 112 Miss. 165, 167, 72 So. 891, 891-892 (1916). This case is discussed *supra* under the *Gulf Refining Company* case. While it is believed the *Kreutzer* case was properly decided, it is to be distinguished from the case in question.

[102]The act contains the standard separability clause, providing that if part of the act is found to be unconstitutional the balance of the act is to remain in effect (section 10 of the act). It was this provision in the act that enabled the court to pass on the constitutionality of the ad valorem exemption separate from the "documentary tax" provision. Adams v. Standard Oil Co. of Kentucky, 98 Miss. 262, 53 So. 592 (1911). *Accord,* 11 Am. Jur. 834-849; 50 *id.* 354.

"it was within the legislative providence and power to exempt both the existing and the subsequently acquired leases from ad-valorem taxes." The exemption provision of the act was held not to be violative of section 112, Constitution of 1890, because the public interest would be subserved by the exemption granted and the provision was reasonable. The court also relied strongly on the statements of public policy and purposes in the body of the act.

The dissenting opinion of Mr. Justice Roberds points out the lack of uniformity and equality of the act,[103] mentions section 9770,[104] and comments on the statements of policy enumerated in the act, as follows:

> The first stated object is to encourage the purchase of oil and mineral leases. It may well be doubted whether this is such a general public benefit as justifies a tax exemption . . . .
>
> The second stated object is to encourage the drilling for and production of minerals in this State . . . . The natural result of such exemption is to delay operations. If it cost the owner nothing to retain the lease, that is certainly not a reason to hurriedly extinguish his right. The reason would defeat the object.
>
> The third stated object is to relieve county officials of the "onerous" duty of collecting the tax. This, to say the least, is a novel public benefit. Carried to its logical conclusion it becomes absurd.[105]

Although there is authority for sustaining the ad valorem exemption,[106] a more desirable result would have been reached in holding the

---

[103]Mr. Justice Roberts stated: "That the Act under consideration (Chapter 409, General Laws 1946) does not comply with these requirements [section 112, Constitution of 1890] can be demonstrated, I think, by a simple example: John Doe owns 200 acres of land. The ad valorem tax thereon amounts to $80.00 per year. Richard Roe and others own the minerals under the land, a twenty-year oil and gas lease and the royalty rights thereon . . . . Richard Roe and others pay a total tax [under the act] of $16.00 on their property. They pay that only once and that is all they ever pay as far as this Act is concerned. During the twenty years John Doe pays a total of $1,600.00 taxes, not counting annual interest on his money. I have used an example where the respective values are equal. Hundreds of examples might be used where the value of the mineral and royalty rights is several times that of the value of the surface. The extent of the injustice simply depends upon the comparative values . . . . There is neither uniformity nor equality nor justice in this tax and the mineral and royalty interests are not taxed in proportion to their value." See note 96 *supra*.

[104]Miss. Code Ann. (1942).

[105]See note 96 *supra*.

[106]Lawrence v. State Tax Commission, 286 U.S. 276, 52 S.Ct. 208, 76 L.Ed. 1102 (1931); Columbus & G. R. Co. v. Miller, 289 U.S. 96, 51 S.Ct. 392, 75 L.Ed. 861 (1930); Meador v. Mac-Smith Garment Co., 188 Miss. 98, 191 So. 129 (1939); Albritton v. Winona, 181 Miss. 75, 178 So. 799 (1938); Jackson v. Deposit Guaranty Bank & Trust Co., 160 Miss. 752, 133 So. 195 (1931); Miller v. Lamar Life Insurance Co., 158 Miss. 753, 131 So. 282 (1930); Jackson v. Mississippi Fire Insurance Co., 132 Miss. 415, 95 So. 845 (1923).

exemption provision to be unconstitutional. This would still leave moot the question of the constitutionality of the "documentary tax," which, it is submitted, should be constitutional. The amount of the "documentary tax" is relatively so small, when compared with what could be levied for ad valorem taxation of the same interest, that it would be neither burdensome nor double taxation.[107] The result would be, if this had been done, to increase the source of the State's revenue; and, at the same time, to leave all mineral interests subject to ad valorem assessment as provided by statute. Approval of the ad valorem exemption not only aids oil companies having leases on thousands of acres of land by enabling them to hold these leases for the maximum period by payment of a small tax (assuming the "documentary tax" will be found constitutional), but it will hurt the lessor in two ways (1) by decreasing the possibility of early development of the mineral estate, and (2) by discriminating against the lessor, if he also owns the surface estate, as to the amount of taxes paid.

It is still possible that when the question of the constitutionality of the "documentary tax" is presented squarely the court will find it to be unconstitutional, and in so doing the court might also find that, in spite of the separability clause,[108] the legislature did not intend to provide the exemption without the tax, thereby declaring the entire act void.

There is another possibility. If the court should find the "documentary tax" constitutional (thereby sustaining the act in its entirety), the legislature could subsequently repeal the ad valorem exemption provision of the act.[109] There would then remain a valid "documentary tax," and the mineral estate would be assessable for ad valorem taxes under the Mississippi statutes.

Conclusion

Although the correct result was reached in the *Gulf Refining Company* case, the language used in achieving this result is not consistant with the issue involved and has been used by subsequent decisions to achieve an undesirable end. If the act there under consideration is considered solely as a *privilege* tax it should not have been compared or confused with a property tax, and could have been properly applied to the lessor and lessee interests in addition to an ad valorem tax, if that had not been expressly exempt, without constituting double taxation. The *Smith County Oil Company* case cannot be supported by general authorities and was incorrectly decided. The right to assess the royalty

---

[107]See note 70 *supra*.
[108]See note 102 *supra*.
[109]Mississippi Mills v. Cook, 56 Miss. 40 (1909).

interest for ad valorem taxes in the *Smith County Oil Company* case could, and should, have been upheld without reference to, or reliance upon, the *Gulf Refining Company* case, and the holding should have been predicated on section 9769 and 9770.[110] The *Stern* case then would have fallen into its logical position. Stern might have had his half-interest in the minerals separately assessed, but he failed to do so. Since the description of the land on the assessment roll apparently included the minerals, the title to them was also included at the tax sale. Under section 9744[111] the tax is a charge on the land and the sale is a proceeding against the thing sold; therefore, it makes no difference whether the property was assessed to the right person or not.

The "mineral documentary tax," if found to be constitutional, will exempt from ad valorem taxes all interests in *non-producing* mineral estate conveyed subsequent to the effective date of the act, and will exempt from ad valorem taxes only those *non-producing* mineral estates now of record whose owners comply with the provisions of the statute. In addition to the unsatisfactory legal condition created by the act, in time this might become undesirable from a general economic standpoint. If, however, the "documentary tax" is declared unconstitutional, and as a necessary part of the tax provision the ad valorem exemption is found invalid, then the ad valorem assessment of mineral estates under the Mississippi statutes would be affected by the three principal cases discussed in this Note. The more desirable result, as has been shown, would be to collect the ad valorem taxes and the "documentary tax." Regardless of the result reached under the "documentary tax" act, the doctrine of the *Smith County Oil Company* case should be renounced and the legislative mandate of sections 9769 and 9770 restored. This is desirable because: (1) the illogical prerequisites required by the court for ad valorem assessment of oil and gas makes it impossible to comply with the statutory provisions for such assessments; (2) the rule announced is inconsistant with recognized legal principals applicable to the assessment of minerals; and (3) if used to determine the nature of the estate owned by the lessee or royalty owner, a result contrary to the theories of ownership of oil and gas already adopted might be reached. The obvious confusion concerning taxation of non-producing mineral estates under the cases discussed herein is undesirable.

George J. Schweizer, Jr.

---

[110] *Miss.* Code Ann. (1942).
[111] *Ibid.*

RECENT DECISIONS

Administrative Law—Notice and Hearing—Revocation of Beer Permit by State Tax Commissioner

A Mississippi statute[1] authorizes the State Tax Commissioner to revoke a beer permit after giving the permit holder ten days notice of the proposed revocation. Another statute[2] states the grounds on which the revocation must be based. The permit of the appellee was revoked by the Commissioner after notice and hearing because whiskey had been sold on the premises. In a suit by the appellee to enjoin the revocation, the chancellor held the statute to be unconstitutional because it provided for a deprivation of property without "notice and hearing" thereby violating "due process."[3] On appeal, reversed and remanded. Held: The statute is constitutional. The legislature may forbid the sale of beer; and what it may forbid, it may absolutely control. As to notice and hearing, compliance with the statute is sufficient for a valid revocation. *Farish v. Stone, State Tax Commissioner,* 23 So. (2d) 911 (Miss. 1945).

The courts of the United States are practically uniform in holding that a liquor license is a mere privilege, revocable at the will of the state. The reasons usually given are: (1) Such a license involves no contractual right between the state and the individual and does not create a vested property right.[4] (2) The licensee, in accepting and acting under the license, accepts or consents to the conditions imposed thereby, which include the privilege of the state to revoke.[5] Actually, the courts are influenced by the fact that the occupation licensed is one which is subject to some popular disfavor.[6]

Since the power of the state is absolute as regards the granting and revocation of licenses, it may delegate the exercise of such power to boards or commissions. The functions of a commission vested with such authority are said to be "administrative" and not "judicial", so no legal or constitutional right is invaded by summary revocation.[7]

Where the statute requires notice and hearing as condition precedent to revoking a license for the sale of intoxicating beverages, compliance with the statute is essential to a valid revocation.[8] However, where the statute is silent on

---

[1]Miss. Code Ann. (1942) § 10257.

[2]*Id.* § 10213.

[3]Stricker, *Farish v. Stone, Chairman, State Tax Commission* (1945) 17 Miss. L. J. 164 (Opinion of the Chancellor).

[4]State *ex rel.* Krasner v. Alcoholic Beverage Control Board, 246 Ala. 129, 19 So. (2d) 841 (1944); Phillips v. Foreman, 206 Ark. 553, 177 S.W. (2d) 38 (1944); Cook v. Glazer's Wholesale Drug Co., 189 S.W. (2d) 897 (Ky. 1945); Zicherman v. Driscoll, 133 N.J.L. 586, 45 A. (2d) 620 (1946).

[5]Phillips v. Foreman, 206 Ark. 553, 177 S.W. (2d) 38 (1944); Owens v. Rutherford, Mayor, 36 S.E. (2d) 309 (Ga. 1945); Brown, Kentucky Alcoholic Beverage Control Board v. Baumer, 301 Ky. 315, 191 S.W. (2d) 235 (1945).

[6]Tuttrup, *Necessity of Notice and Hearing in the Revocation of Occupational Licenses* (1927) 4 Wis. L. Rev. 180.

[7]Darling Apartment Co. v. Springer, Liquor Commissioner, 22 A. (2d) 397 (Del. 1941); Texas Liquor Control Board v. O'Fallon, 189 S.W. (2d) 885 (Tex. 1945). See first cited case for extended list of authorities.

[8]Darling Apartment Co. v. Springer, Liquor Commissioner, 22 A. (2d) 397 (Del. 1941); Cino v. Driscoll, Commissioner of State Dept. of Alcoholic Beverage Control, 130 N.J.L. 535, 34 A. (2d) 6 (1943); Chiordi v. Jernigan, Chief of Div. of Liquor Control, 46 N.M. 396, 129 P. (2d) 640 (1942).

the subject, the majority of the courts hold that no notice and hearing are necessary.[9] A small minority of the courts, while paying lip service to the rule that such licenses create no property right, hold that failure to give notice and hearing is reversible error as being contrary to "legal principles."[10]

The Mississippi Court in the instant case indicates that it based its decision on the ground usually adopted in other jurisdictions, namely, that a permit for the sale of alcoholic beverages is a mere privilege.[11] The Court also stated that a state statute may provide for revocation of a liquor license without a hearing, a position which is in agreement with that taken in other jurisdictions.[12] Ordinarily, as a matter of practice, it is preferable that the Commission give notice and hearing in each case before revocation; however, the court's interpretation that the statute does not require a hearing seems proper. Undoubtedly the Legislature conferred the summary power of revocation after balancing public interest against possible injustices to the licensees through summary action.

P. Gerald Adams

Constitutional Law—Political Question—Apportionment

The congressional districts of Illinois have great disparity of population.[1] Three electors of the most thickly populated district sue in the District Court under the Federal Declaratory Judgment Act to have the statutes apportioning the State of Illinois into congressional districts declared invalid on the grounds that the districts as set up violate the constitutional right to vote and certain requirements set up by Congress. Held: *Inter alia*, the issue is of a peculiarly political nature and therefore not proper for judicial determination.[2] *Colgrove v. Green*, 66 S.Ct. 1198, 90 L.Ed. 1242 (1946).

---

[9]Darling Apartment Co. v. Springer, Liquor Commissioner, 22 A. (2d) 397 (Del. 1941); Wallace v. Mayor, Etc., of the City of Reno, 27 Nev. 71, 73 P. 528 (1903); State v. Corran, 73 N.H. 434, 62 A. 1044 (1905); Floech v. Bureau of Revenue, 44 N.M. 194, 100 P. (2d) 225 (1940).

[10]State *ex rel.* Krasner v. Alabama Alcoholic Beverage Control Board, 246 Ala. 129, 19 So. (2d) 841 (1944) (Failure to give notice and hearing before refusing to renew license); Balling v. Board of Excise of City of Elizabeth, 79 N.J.L. 197, 74 A. 276 (1909) (New Jersey now has statute requiring notice and hearing before revocation of liquor license); Gaertner v. City of Fond du Lac, 34 Wis. 497 (1874).

[11]Farish v. Stone, State Tax Commissioner, 23 So. (2d) 911, 913 (Miss. 1945): "A permit or license of the kind here involved is not a property or contract right." *Accord:* Coulson v. Harris, 43 Miss. 728 (1871) (Liquor permit is not a vested property right); Read v. Beall, 42 Miss. 472 (1869) (Liquor license is not a contract between the state and the individual); Martin v. Board of Supervisors of Winston County, 181 Miss. 363, 178 So. 315 (1938) (Holder of beer permit consents to all conditions imposed thereby, including the provisions for revocation).

[12]It should be noted that in the present case, a hearing was not denied the appellee. If hearing had not been given, might the court have decided differently? *See* Costas v. Board of Supervisors of Lauderdale County, 15 So. (2d) 365, 368 (Miss. 1943), *sug. error sus. in part*, 16 So. (2d) 378 (Miss. 1944) (Contest of election on the sale of light wines and beer) where the same judge said: "Privileges accorded our citizens, albeit under a mere license, are valuable rights and deserve protection of the law."

[1]Colgrove v. Green. 66 S.Ct. 1198, 90 L.Ed. 1242 (1946) Appendix I (Under the present apportionment the Illinois seventh district has a population of 914,053, while the fifth district has a population of only 112,116).

[2]Seven justices took part in the consideration and decision of the case. Of the seven, three agreed with the "majority" opinion. Mr. Justice Rutledge concurred saying that the court should refuse to exercise jurisdiction in this case because

No practical test has been devised to determine when a question is political to the exclusion of justiciability. Even when denying relief because the issue is political, the majority of courts do not attempt to define "political question," many simply saying that history or custom dictates their so holding.[3] The definitions that are attempted by the courts are not satisfactory for determining whether a future issue will be declared political and not justiciable.[4]

Whether apportionment is a political question is unsettled. The question of justiciability is the same whether the apportionment is for congressional representatives or for members of a state legislature. The wording of the state constitutions controlling legislative apportionment has much to do with determining whether the apportionment is subject to review. The constitutions vary in control from mandates as to the time and manner of apportioning to permission to apportion as the legislature sees fit. If discretion has been allowed by the constitution, the legislature is not subject to judicial review unless there is such an abuse of the discretion as to be in defiance of the constitution.[5] The judiciary is the department which is charged with the special duty of determining the limitations which the law places upon all official action;[6] so when there has been such an abuse, or when the constitution vests no discretion in the legislature, apportionment should be subject to judicial review as every other legislative act.[7] However, some courts will not take jurisdiction even in such cases.[8]

As in all cases, for the court to grant relief the complainant must have suffered a recognizable injury, and must ask for a relief that can be rendered effectively. Some courts after taking jurisdiction refuse to grant relief on the grounds that

---

the "cure"—election at large, would be worse than the "disease"—election by unequally populated districts. Mr. Justice Black and two justices expressed a dissenting opinion that the court should grant relief. He raised the question of whether relief would be refused if the legislature had redistricted the state so that all but one of the representatives were elected from the smallest county and the remaining representative was elected from all the other counties. Mr. Justice Black said this would be a denial of equal weight to every vote, which right is impliedly granted to everyone by U. S. CONST. Art. 1, § 2.

[3]Coleman v. Miller, 307 U.S. 433, 59 S.Ct. 972, 83 L.Ed. 1385 (1939); Smith v. Howard, 275 Ky. 165, 120 S.W. (2d) 1040 (1938); State v. McLean, 35 N.D. 203, 159 N.W. 847 (1916); Putnam v. Norblod, 134 Ore. 433, 293 P. 940 (1930).

[4]Parker v. State, 133 Ind. 178, 32 N.E. 836 (1893); *In re* McConaughy, 106 Minn. 392, 119 N.W. 408 (1909); Geauga Lake Improvement Ass'n v. Lozier, 125 Ohio 565, 182 N.E. 489 (1932); (1909) 22 HARV. L. REV. 132.

[5]Board of Com'rs of Marion County v. Jewett, 184 Ind. 63, 110 N.E. 553 (1915); Richardson v. McChesney, 128 Ky. 363, 108 S.W. 322 (1908); Stenson v. Secretary of State, 308 Mich. 48, 13 N.W. (2d) 202 (1944); Leonard v. Miller, 216 N.C. 89, 3 S.E. (2d) 316 (1939); State *ex rel.* Gallagher v. Campbell, 48 Ohio 435, 27 N.E. 884 (1891); State *ex rel.* Bowman v. Dammann, 209 Wis. 21, 243 N.W. 481 (1932); 16 C.J.S. 438.

[6]*In re* McConaughy, 106 Minn. 392, 119 N.W. 408 (1909).

[7]Stiglitz v. Schardien, 239 Ky. 799, 40 S.W. (2d) 315 (1931); Ragland v. Anderson, 125 Ky. 141, 100 S.W. 865, 128 Am.St.Rep. 242 (1907); Donovan v. Suffolk County Apportionment Com'rs, 255 Mass. 55, 113 N.E. 740, 2 A.L.R. 1334 (1916); City of Lansing v. Hilliard, 308 Mich. 560, 14 N.W. (2d) 426 (1944); Jones v. Freeman, 146 P. (2d) 564 (Okla. 1944); State *ex rel.* Lamb v. Cunningham, 83 Wis. 90, 53 N.W. 135, 17 L.R.A. 145 (1892).

[8]People *ex rel.* Fergus v. Blackwell, 342 Ill. 223, 173 N.E. 750 (1930) (court cannot do indirectly by quo warranto what it cannot do directly by mandamus); Board of Comrs of Marion County v. Jewett, 184 Ind. 63, 110 N.E. 553 (1915); Leonard v. Miller, 216 N.C. 89, 3 S.E. (2d) 316 (1939).

the injury is not sufficient or that the relief is not suitable.[9] Sufficient damage might be pecuniary,[10] as the taxes of a citizen, or political,[11] as the loss of an elector's right to vote. A relief that may be granted is a declaration that the apportionment is invalid,[12] or an injunction against proceeding with an election under the allegedly invalid apportionment.[13] Mandamus will not issue to the legislature regardless of the mandatory wording of the constitution.[14] Although the courts cannot make an apportionment and cannot compel the legislature to make an apportionment, if the present apportionment is declared invalid and election required to be from the state at large,[15] the incumbents will reapportion without delay to prevent their having to canvass the entire state for re-election.

To circumvent the difficulty of obtaining reapportionment from the legislature, some state constitutions have been amended to provide for reapportionment by an independent board composed of state officials. The majority and better view allows mandamus to issue to these boards,[16] but a minority of courts refuse to issue mandamus on the theory that such boards are "miniature legislatures" and not subject to mandamus for a legislative function.[17] This minority view would defeat the very purpose for which the constitutions were amended.

The Mississippi Constitution provides that "The legislature *may* [italics mine] make a new apportionment of senators and representatives . . ." and places no limitations or restrictions on the legislature if it does choose to make a new apportionment.[18] It would seem from the decisions cited that the Mississippi legislature will not be subject to interference by the judiciary in the matter of apportionment unless there is an amendment to the Mississippi Constitution.

Griffin Norquist

Husband and Wife—Liability of Wife for Necessaries

Appellee hospital instituted suit on an account by attachment in chancery of certain real estate belonging to appellant, a married woman alleged to be a nonresident. The account was for medical and hospital expenses incurred in connection with an operation performed on the appellant. Arrangements for the charge

---

[9]Brumfield v. Brock, 169 Miss. 784, 142 So. 745 (1933) (lengthening of ballot is too trifling expense to taxpayer to be recognizable by the court); Jones v. Freeman, 146 P. (2d) 564 (Okla. 1944).

[10]Stiglitz v. Schardien, 239 Ky. 799, 40 S.W. (2d) 315 (1931); *but see* Brumfield v. Brock, 169 Miss. 784, 142 So. 745 (1933), cited *supra* note 9.

[11]Jones v. Freeman, 146 P. (2d) 564 (Okla. 1944); State *ex rel.* Lamb v. Cunningham, 83 Wis. 90, 53 N.W. 135, 17 L.R.A. 145 (1892).

[12]Stiglitz v. Schardien, 239 Ky. 799, 40 S.W. (2d) 315 (1931); *In re* State *ex rel* Attorney General, 220 Wis. 25, 264 N.W. 633 (1936). "An action for a declaratory judgment is an especially appropriate method of determining a controversy with respect to the constitutionality of legislation." 1 C.J.S. 1043.

[13]Stevens v. Martindale, Secretary of State, 181 Mich. 199, 148 N.W. 97 (1914); Rogers v. Morgan, 127 Neb. 456, 256 N.W. 1 (1934).

[14]Fergus v. Marks, 321 Ill. 510, 152 N.E. 557, 46 A.L.R. 960 (1926); Wood v. State *ex rel.* Gillespie, 169 Miss. 790, 142 So. 747 (1932).

[15]2 U.S.C.A. § 2a provides for election at large for congressional representatives in certain cases. State constitutions may make the same provisions in the case of election of state legislators.

[16]Merrill v. Mitchell, 257 Mass. 184, 153 N.E. 562 (1926); State *ex rel.* Herbert v. Bricker, 139 Ohio 499, 41 N.E. (2d) 377 (1942).

[17]State *ex rel.* Barrett v. Hitchcock, 241 Mo. 433, 146 S.W. 40 (1912).

[18]Miss. Const. (1890) § 256.

account had been made by her husband and his employers. The husband had made some small payments on the indebtedness and thereafter had separated from the appellant. They were living apart at the time of the trial. The bill of complaint named the appellant as the sole defendant. She entered an appearance and denied liability. HELD: There is no liability of a married woman for expenses incurred by a contract for necessaries, if she is living with her husband at the time of contract, unless there is an express agreement on her part to pay for the same. "To bind her personally, it must be made to appear that necessaries were supplied on her individual credit; where credit is given to the husband, *or to the husband and wife* [Italics added], the wife is not liable."[1] *McLemore v. Riley's Hospital, Inc.*, 197 Miss. 317, 20 So. (2d) 67 (1944).

Despite the Mississippi statute abolishing the disability of coverture,[2] there is no question in this state that, in absence of a contract by her, a married woman is not liable, either primarily or secondarily, for necessaries purchased for her or her family's use.[3] This rule has been modified in numerous states by family expense statutes.[4] In most jurisdictions the statutes in substance prescribe the joint or several liability of the wife for the purchase of necessaries. This liability is imposed although the contract be made by the husband alone. Such statutes are a decided departure from the general common law rule that contracts of a married woman are not binding on her.[5]

In respect to the actual facts pleaded by the appellee hospital, the holding by the court that there could be no recovery from the defendant reiterates well-established law.[6] The Mississippi Supreme Court, however, in rendering its opinion has

---

[1]McLemore v. Riley's Hospital, Inc., 197 Miss. 317, 321, 20 So. (2d) 67, 68, 69 (1944); *see* 41 C.J.S. 533; Parkinson v. Hammond, 5 W.W.Harr. 145, 159 A. 846 (Del. 1932).

[2]MISS. CODE ANN. (1942) § 451: "Married women are fully emancipated from all disability on account of coverture; and the common law as to the disabilities of married women and its effect on the rights of property of the wife, is totally abrogated, and marriage shall not impose any disability or incapacity on a woman as to the ownership, acquisition, or disposition of property of any sort, or as to her capacity to make contracts and do all acts in reference to property which she could lawfully do if she were not married; but every woman now married, or hereafter to be married, shall have the same capacity to acquire, hold, manage, control, use, enjoy and dispose of all property, real and personal, in possession or expectancy, and to make any contract in reference to it, and to bind herself personally, and to sue and be sued, with all the rights and liabilities incident thereto, as if she were not married."

[3]Galtney v. Wood, 149 Miss. 56, 115 So. 117 (1927), where a married woman sought as part of damages hospital expenses incurred by her but where she did not allege express contract or actual payment, recovery not allowed. ". . . but the common law still obtains in this state, and we think that, notwithstanding the removal of the disability of coverture and the grant of suffrage to her, we are still compelled to hold that the common law rule obtains." *Cf.* Thomas v. Weeks, 115 Miss. 602, 76 So. 559 (1917).

[4]Nineteen states have enacted family expense statutes under which the expenses of the family are chargeable on the property of both husband and wife. 3 VERNIER, AMERICAN FAMILY LAWS (1935) § 160; 41 C.J.S. 534; Note (1921) 15 A.L.R. 856.

[5]Potter v. Florida Motor Lines, Inc., 57 F. (2d) 313 (S. D. Fla. 1932); *see* 41 C.J.S. 653; 1 WILLISTON, CONTRACTS (2d ed. 1924) § 265.

[6]Galtney v. Wood, 149 Miss. 56, 115 So. 117 (1927); *see* Manley v. Chamberlin-Johnson-Du Bose Co., 41 Ga.App. 31, 151 S.E. 676 (1930); Scates v. Canvas Decoy Co., 5 Tenn.App. 695 (1927); Note (1921) A.L.R. 848.

incorporated therein a quotation from CORPUS JURIS SECUNDUM,[7] which constitutes dicta not in accord with the meaning conveyed by the emancipation statute. Although strongly supported by the inferences in numerous reference books and in the dicta of various courts, the statement that a wife is not liable when credit is given to her and her husband has no great numerical weight of authority in direct support thereof.[8] There has been a surprisingly small amount of litigation in the appellate courts on this question.

It is understandable that emancipation statutes being in derrogation of the common law are to be construed most strictly. In states where there are similar statutes, this general rule of construction is undoubtedly responsible for the language of the courts in elucidation of their decisions on problems involving the liability of a married woman on her own contract, or of the husband where there was no express agreement by his spouse to pay individually. "A wife is not liable unless she expressly and individually contracts or signifies that she intends that she, and not her husband, will assume the obligation" is typical verbiage utilized by the courts as a touchstone for their decisions.[9] The basis for this expression may be found in the general rule that a joint contract for necessaries will in the absence of any statutory liability against the wife's property be regarded as the contract of the husband only.[10]

In adhering to the line of reasoning that if credit is given to husband and wife the husband alone is liable, have the meaning and purpose of the statutes abolishing the disabilities of coverture been too narrowly interpreted? Can a joint account not be considered the individual and express promise of each party to be bound severally and jointly? Where the account is in the name of both husband and wife, where the wife incurs the major portion of the debt, and where the personal estate of the wife is large, a demand by the merchant that the account be in the name of both would seem conclusive that he was seeking to bind both parties individually: compliance by the wife to such conditions would leave no doubt that she expected to be held on the debts charged to that account. Even the Pennsylvania court, which followed the rule that a joint contract for necessaries is not enforceable against the wife, held that book entries charging goods to husband and wife jointly are merely presumptive evidence of a sale on his credit.[11] Where credit is given to both husband and wife, and it is the intention of the parties that both be liable separately or jointly, it would seem that the presumption has been decisively rebutted. To hold otherwise would abrogate the letter and spirit of the emancipation statute.

The rule that if a wife personally contracts with a third party for necessaries and agrees to pay for them she is individually liable therefor, regardless as to the

---

[7]41 C.J.S. 532: ". . . where credit is given to the husband, or to the husband and wife, the wife is not liable." This language has apparently been adopted from the instruction of the judge in Parkinson v. Hammond, 5 W.W.Harr. 145, 159 A. 846 (Del. 1932).

[8]Parkinson v. Hammond, 5 W.W.Harr. 145, 159 A. 846 (Del. 1932) is the sole case found to be in unqualified support of such a holding. *But see* Lane v. McAlpine *et ux*, 115 Cal.App. 607, 2 P. (2d) 184 (1931); Reynolds v. Starks, 16 Ga.App. 606, 85 S.E. 950 (1915); Snyder-Bell Grocery Co. v. Hamilton *et ux*, 276 S.W. 752 (Tex.Civ.App. 1925).

[9]Lajunsky v. Revell, 167 N.C. 508, 83 S.E. 820 (1914); *see* Maney v. McMahon, 83 N.J.L. 120, 83 A. 504 (1912); Paul v. Roberts, 50 Mich. 611, 16 N.W. 164 (1883).

[10]41 C.J.S. 809.

[11]Hoff *et ux*. v. Koerper, 103 Pa. 396 (1883); Rigoney *et ux* v. Neiman, 73 Pa. 330 (1873). Pennsylvania has subsequently adopted a family expense statute. 3 VERNIER, AMERICAN FAMILY LAWS (1935) § 160.

liability of her husband, has been accepted by the Mississippi court.[12] Where the disabilities of coverture have been abolished, some courts have construed the facts in cases in which credit was given to both husband and wife as not controlled by the rule that joint contracts for necessaries are binding on the husband alone. Thus where both husband and wife agreed to pay the rent of the apartment house in which they were living, recovery against the wife was allowed.[13] Where a wife and her husband sign a promissory note for clothing, hats, etc., for herself and her children, he and she become joint debtors. The wife in such a case does not undertake to pay the debt of her husband; her undertaking is to pay her own debt which she has made by her own sharing in the consideration and by uniting in the joint contract to pay the whole sum.[14] Recovery has been allowed from a wife who had ordered groceries for the use of her family, where the account had been charged to both husband and wife.[15]

Under a strict interpretation of the language quoted by the court in its decision in the *McLemore* case, it could not have rendered judgment in accordance with the principles stated by the respective courts in each of the above instances. No matter how express the wife's promise might be, if credit to the husband was also given on the same items, there is no liability on the part of the wife. It is in logical sequence to add that there has been no emancipation despite the statute. If the court so restricts the rights of married women to contract for necessaries on a joint account by such a narrow construction of the statute, it is submitted that a limited family expense statute might deserve consideration, not to relieve the husband of his family responsibilities, but to bring the law nearer to the spirit and general understanding of the age.

Owen Palmer, Jr.

Labor Law—N.L.R.A.—Legality of "Company Plans"

The employing company operated under a "Multiple Management" Plan, which described the company's Board of Directors as the "Senior Board" and provided for a "Manufacturing" or "Junior" Board, composed of employees. The function of the Junior Board was to consult with management concerning not only production and similar problems, but also such matters as rates of pay, hours of employment, retirement, and profit sharing. It also considered and made recommendations in at least one discharge case. The company bore all expenses of the Junior Board and conducted the elections of its members. The Board of Directors approved all nominees and had power to remove them. Meetings and elections were held on company property on company time, and company officers participated in the meetings. National Labor Relations Board petitioned Circuit Court of Appeals for enforcement of its order disestablishing the Plan. Held: Enforcement decree order issued. The Junior Board was a "labor organization" within the meaning of

---

[12]Skehan v. Davidson County, 164 Miss. 518, 145 So. 247 (1932); Galtney v. Wood, 149 Miss. 56, 115 So. 117 (1927).

[13]Lane v. McAlpine *et ux*, 115 Cal.App. 607, 2 P. (2d) 184 (1931); *cf.* Chafee v. Browne *et ux*, 109 Cal. 211, 41 P. 1028 (1895).

[14]Reynolds v. Starks, 16 Ga.App. 606, 85 S.E. 950 (1915). *But see* Butler v. Godley, 151 Ga.App. 784, 181 S.E. 494 (1935).

[15] Snyder-Bell Grocery Co. v. Hamilton *et ux*, 276 S.W. 752 (Tex.Civ.App. 1925).

the National Labor Relations Act.[1] It was company-fostered and dominated and its operation constituted an unfair labor practice under the Act.[2] *National Labor Relations Board v. Jas. H. Matthews & Co.*, 156 F. (2d) 706 (C.C.A. 3rd, 1946).

A "company plan" differs from a "company union."[3] A "company plan" is established by the company and maintained at its expense, and provides for both management and labor participation in discussing production and similar problems.[4] A "company union" is an organization of employees of a single company, the activities of which are limited to grievances, wages, hours, or conditions of work relating to employees of that particular company.[5]

A company union which is not dominated or supported by the company is perfectly lawful under the Act.[6] One which is dominated or supported by the company is unlawful.[7]

It will be noted that a company plan, because of its peculiar composition, with both employer and employee participation in its activities, is necessarily fostered and dominated by the company. Hence, if the Plan possesses any of the attributes of a collective bargaining unit or performs any of the functions of a "labor organization,"[8] it is unlawful.[9] Clearly a Plan which discusses and engages in activities related to wages, rates of pay, hours of work, seniority rights, vacations and vacation pay, discharge of employees, and the like, would be classified as a "labor organization" within the meaning of the Act and therefore, because company-dominated and supported, would be unlawful.[10] The instant case is one of the latest examples of such a holding.

On the other hand, a company plan, although created and controlled by the company, is perfectly lawful if confined to its proper sphere.[11] The following sub-

---

[1]29 U.S.C.A. § 152(5): "The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

[2]29 U.S.C.A. § 158(2): "It shall be an unfair labor practice for an employer . . . To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, that . . . an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay."

[3]A company union is sometimes called an "inside union" as distinguished from an "outside union."

[4]BUFFORD, THE WAGNER ACT (1941) 127.

[5]*Id.* at 125.

[6]Magnolia Petroleum Co. v. N.L.R.B., 112 F. (2d) 545 (C.C.A. 5th, 1940).

[7]Bethlehem Shipbuilding Corp. v. N.L.R.B., 114 F. (2d) 930 (C.C.A. 1st, 1940); Republic Steel Corp. v. N.L.R.B., 107 F. (2d) 472 (C.C.A. 3rd, 1939).

[8]See note 1 *supra*.

[9]N.L.R.B. v. Newport News Shipbuilding Corp., 308 U.S. 241, 60 Sup. Ct. 203, 84 L.Ed. 219 (1939); Continental Oil Co. v. N.L.R.B., 113 F. (2d) 473 (C.C.A. 10th, 1940); Magnolia Petroleum Co. v. N.L.R.B., 112 F. (2d) 545 (C.C.A. 5th, 1940); Kansas City Power and Light Co. v. N.L.R.B., 111 F. (2d) 340 (C.C.A. 8th, 1940); N.L.R.B. v. H. E. Fletcher Co., 108 F. (2d) 450 (C.C.A. 1st, 1939).

[10]See note 1 *supra* and cases cited *supra* note 9.

[11]The typical Board order requires the employer to disestablish the dominated organization as the *representative* of his employees for the purpose of dealing with him *concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work*. Bethlehem Shipbuilding Corp. v. N.L.R.B., 114 F. (2d) 930 (C.C.A. 1st, 1940), cited *supra* note 7. Kansas City Power and Light Co.

jects have been held to be within the "proper sphere" of a true company plan and not to make the Plan a "labor organization" within the meaning of the Act: health, relief, pension, and savings programs, and social and recreational activities.[12] Further, it seems clear that a Plan could provide for the consideration of such matters as manufacturing techniques, efficiency programs, and other related production problems without violating the Act.

The recent trend in Labor policy has been to extend the activities of labor organizations into fields heretofore left unmolested.[13] It is not clear what result this trend will have on future Labor Board action in respect to company plans. Conceivably the Board in the future may deem it advisable or necessary to limit further the activities of company plans so as to exclude from their permissible scope such activities as health, hospitalization, relief, and pension programs.

Rowland W. Heidelberg, Jr.

Property—Acquisition of Public Road by County—Prescription or Dedication?

The employees of the county maintained a road for public use across property of defendants for about seventeen years. The roadway had not been designated a public road by order of the county Board of Supervisors. When defendants erected gates across the road, the county sued to compel removal thereof. Held: Defendants enjoined from maintaining obstructions across road. The county acquired an easement by prescription through adverse use. *Armstrong v. Itawamba County,* 195 Miss. 802, 16 So. (2d) 752 (1943).

Under the common law of England, custom, prescription, and dedication were three recognized ways of acquiring property. Custom was the acquisition of property rights by a group or class through immemorial use from time "whereof the memory of man runneth not to the contrary."[1] Prescription was the attainment of property rights through adverse use over a period of time, whereby a grant was presumed to have been given originally but lost or destroyed during the passage

---

v. N.L.R.B., 111 F. (2d) 340 (C.C.A. 8th, 1940), cited *supra* note 9. This does not prevent such organization from carrying on other activities which are not prohibited by the act, provided that they are divorced from functioning in connection with any labor organization and are conducted without discrimination against or in favor of any labor organization. Third Annual Report of N.L.R.B. (1938), p. 198, citing Central Truck Lines. Inc., 3 NLRB 317 (1937); S. Blechman & Sons, Inc.. 4 NLRB 15 (1937); Utah Copper Co., 7 NLRB 928 (1938) [as cited in 2 Teller, Labor Disputes and Collective Bargaining (1940) 760]. Bethlehem Steel, 14 NLRB 44 (1939); Bethlehem Shipbuilding Corp., 11 NLRB 105, 157, 148 (1939); Sen. Rep. No. 573, 74th Cong., 1st Sess. (1935) 10 [as cited in Bufford, *op. cit. supra* note 4, at 132]. The last cited case was enforced in Bethlehem Shipbuilding Corp. v. N.L.R.B., *supra.*

[12]See note 11 *supra.*

[13]In the recent coal strike, settled in May, 1946, John L. Lewis was successful in extending the activities of his United Mine Workers union to include the fields of health, hospitalization, relief, and insurance. See *Time Magazine,* Vol. XLVII, No. 23, June 10, 1946, p. 25.

[1]"In England, persons of a certain locality or of a certain class may have, by immemorial custom, a right to make use of land belonging to an individual." 3 Tiffany, Real Property (3d ed. 1939) § 935.

of time.[2] A distinction was made between prescription and custom in that prescription applied to individuals whereas custom applied to a class of persons or to a community.[3] Dedication was a manner of securing property through gift and ordinarily was utilized in a donation of property to a class. Only donation and acceptance were necessary.[4]

Custom, as a method of acquiring property, was never used in this country, because customs here could not have the immemorial antiquity requisite to their validity.[5] There remained only the acquisition of individual rights by prescription and of public rights by dedication. The courts have intermingled and confused these methods with each other and with custom. One of the reasons for the confusion on the subject of prescription and dedication is the reluctance of the courts to specifically designate the reasons for their holdings and whether they are based on dedication or prescription.

It is settled law in this country that the public may acquire an easement for a right of way by prescription.[6] This is a result of the influence of the English concepts of custom and dedication. Since the public cannot acquire property by a grant, the term prescription cannot accurately be applied to public roads. As adverse use is repulsive to dedication, that form of acquisition also is inapplicable. Therefore, from a technical view, a rule stating that the public may acquire an easement for a right of way by prescription is unsound. The better view is that long continued use by the public evidences a dedication, where there has been no adverse use; just as long continued use by an individual is evidence of a grant where the use was adverse.[7]

A public road may be created by dedication, prescription, or by statutory procedure.[8] Since the county in the instant case did not comply with the statutory requirements for the acquisition of a public road, the decision must have been based

---

[2]"Prescription is a mode of acquiring title to property by immemorial or long continued enjoyment. It refers to personal usage restricted to claimant and his ancestors or grantors." Zetrouer v. Zetrouer, 89 Fla. 253, 103 So. 625, 627 (1925). 4 TIFFANY, REAL PROPERTY (3d ed. 1939) § 1133.

[3]"Thus a privilege for the inhabitants of a certain town or parish to dance and play games on a particular piece of land may grow out of a custom immemorially continued; but if the owner of a lot of land has a right of way over his neighbor's field because he, or he and his grantors have walked across it for many years, he is the owner of an easement founded on prescription." Fitch v. Rawling, 2 H.Bl. 393, 126 Eng.Rep.R. 614 (1795).

[4]"Dedication is appropriation or gift by landowner of land or easement therein for public use." *In re* Martin, 249 N.Y.S. 549, 553; 140 Misc. 327 (1931).

[5]"In this country a personal right of way or other easement resting on local custom is not recognized for the reason that the rules of the English common law which gave them sanction are not adapted to the conditions of political society here existing." 9 R.C.L. 743. Graham v. Walker, 78 Conn. 130, 61 A. 98, 112 A.S.R. 93, 3 Ann.Cas. 641, 2 L.R.A. (N.S.) 983 (1905); Talbot v. Grace, 30 Ind. 389, 95 Am.Dec. 703 (1868); Attorney General v. Tarr, 148 Mass. 309, 19 N.E. 358, 2 L.R.A. 87 (1889).

[6]Itawamba County v. Sheffield, 195 Miss. 359, 13 So. (2d) 649 (1943); Wills v. Reid, 86 Miss. 446, 38 So. 793 (1905); Burnly v. Mullins, 86 Miss. 441, 38 So. 635 (1905); Tegarden v. McBean, 33 Miss. 283 (1857); 4 TIFFANY, REAL PROPERTY (3d ed. 1939) § 1211.

[7]Bogler v. Foss, 65 Cal. 250, 3 P. 871 (1884); Pittsburgh C., C. and St. L. Ry. Co. v. Town of Crown Point, 150 Ind. 536, 50 N.E. 741 (1898); Post v Pearsall, 22 Wend. 444 (N.Y. 1839).

[8]3 TIFFANY, REAL PROPERTY (3d ed. 1939) § 924.

on either prescription or dedication. The Court stated that the use of the road by the public, and the action of public authorities in exercising jurisdiction for so many years gave it the status of a public road. Did the Court mean that such action and use amounted to an implied acceptance of property dedicated, or to the adverse use necessary to the acquisition of property by prescription?

The use of the road by the public or the maintenance by the county must have been the requisities interpreted by the court as supplying the adverseness necessary in prescription. It was admitted that the public use of the roadway was not objected to by the landowners; and further, the use by the public was under no claim of right. Mere use, no matter how long continued, does not create a right by prescription unless such use was adverse.[9] Further, the use by the *public* could not be imputed to the *county* unless the operation of school buses on the roads was deemed a use by the county. Similarly, the maintenance of the road by employees of the county did not provide the adverse use necessary to prescription. Those employees performed maintenance on the road about once a year during the statutory period. To say that such an act constitutes sufficient adverseness to vest an easement in the user at the end of the prescribed period appears to be a rather broad connotation of the phrase "adverse use." A continued use by the county *through its employees* might well be said to constitute a claim of right, but that maintenance once a year is also such an adverse use does not necessarily follow.

If from the facts of the instant case, an adverse use cannot be made out, then the only plausible way for the county to have acquired their easement was through implied dedication.

> Any action on the part of the municipality showing that it has assumed control of the land dedicated is sufficient evidence of acceptance. Repairs or improvements made by or under the authority of officers who have general charge of highways and power to lay them out, may show an acceptance of a highway.[10]

The two main cases relied on by the court apparently are predicated on dedication and acceptance rather than prescription.[11] By way of inference, it would seem that the Court is saying, in effect, that a dedication has resulted from public use without objection for twenty or thirty years, and maintenance by the county for about seventeen years. The facts of the principal case appear to constitute an implied dedication and acceptance rather than the acquisition of an easement by prescription through adverse use.

Finally, as an interpretation of this case, it is believed that, unless the *public use* was imputed to the *county,* the holding was that the county acquired its easement solely by the maintenance of the road for the statutory period.

Edward F. McDowell

---

[9]Warren County v. Mastronardi, 76 Miss. 273, 24 So. 199 (1898).

[10]3 TIFFANY, REAL PROPERTY (3d ed. 1939) § 1107.

[11]Kinnare v. Gregory, 55 Miss. 612 (1878); Rylee v. State, 106 Miss. 123, 63 So. 342 (1913). "The public long enjoyed the right to use this road as a highway and it can be said that there was a dedication of the road through the long acquiescence of the original proprietors of the fee and by their acts which manifested such intention and also that the acceptance of such is fully implied from circumstance of the immemorial usage thereof." *Id.* at 127, 63 So. at 343.

WITNESSES—PRIVILEGED COMMUNICATIONS—CLERGYMAN AND PENITENT

The wife and son-in-law of accused died after consuming poisoned biscuits. Accused privately stated to a minister of the gospel that he had killed his wife, and asked the minister to pray for him. On the trial of accused for murder of his son-in-law the court received testimony of minister as to statement. HELD: Testimony properly received. Since his wife and son-in-law died from the same act, the testimony was relevant and competent on issue of whether accused poisoned his son-in-law. *Barnes v. State*, 23 So. (2d) 405 (Miss. 1945).

The question of privileged communications between a clergyman and penitent was not mentioned in the opinion. Although the court would not be bound by its ruling should it be faced squarely with the question in the future,[1] there is nevertheless a considerable indication here that Mississippi recognizes no privilege between the two.

If this ruling is to be taken as authority, the court is in accord with the common law doctrine. In England communications to the clergy have never been privileged.[2] Except for one early case intimating that there might be some privilege between Catholic priests and penitents,[3] the United States courts have followed the English common law declaring that in the absence of statute there is no privilege.[4]

Privileged communications between clergyman and penitent are recognized by statute in a number of states.[5] In applying these statutes the courts have generally required that the communication be made (1) to a clergyman or officer of the church[6] acting in his professional capacity,[7] (2) in the course of discipline enjoined

---

[1](1) Decision on this question was not necessary for, and did not affect, the decision of the case. Aetna Ins. Co. v. Commander, 171 Miss. 291, 153 So. 877 (1934). (2) The court apparently did not consider this point. Craig, State Tax Collector, v. Brown & Williamson Tobacco Corp., 190 Miss. 360, 200 So. 446 (1941).

[2]8 WIGMORE, EVIDENCE (3rd ed. 1940) § 2394 n. 4, quoting from Wilson v. Rastall, 4 T.R. 753, 759 (1792): "'I take the distinction to be now well settled that the privilege extends to those enumerated cases (of counsel, solicitor, and attorney) at all times, but that it is confined to these cases only.'" Also cited in same note: Greenlaw v. King, 1 Beav. 137 (1838); Anderson v. Bank, L. R. 2 Ch.D. 644 (1876).

[3]8 WIGMORE, EVIDENCE (3rd ed. 1940) § 2394 n. 7, quoting from Christian Smith's Trial, 1 Am.St.Tr. 779 (N.Y. 1817): "'There is a grave distinction, between auricular confessions made to a priest in the course of discipline, according to the canons of the church, and those made to a minister of the gospel in confidence, merely as a friend or advisor.'"

[4]*In re* Swenson, 183 Minn. 602, 237 N.W. 589 (1931); State v. Morehouse, 97 N.J.L. 285, 117 A. 296 (1922).

[5]8 WIGMORE, EVIDENCE (3rd ed. 1940) § 2395, n. 1, lists over half the states, and two jurisdictions in Canada.

[6]Reutkemeier v. Nolte, 179 Iowa 342, 161 N.W. 290 (1917) (communication privileged though made in presence of Presbyterian minister and three elders).

[7]Alford v. Johnson, 103 Ark. 236, 146 S.W. 516 (1912); Milburn v. Haworth, 47 Colo. 573, 108 P. 155, 19 Ann.Cas. 643 (1910); State v. Morgan, 196 Mo. 177, 95 S.W. 402 (1906). In Arkansas case cited the testator had told a Methodist minister, although not a member of his church, that he'd had adulterous relations with proponent of will, and that she had great influence over him. Held, not made to clergyman acting in a professional capacity.

by the rules or practice of the church,[8] (3) in the way of a confessional.[9] The courts do not apply the privilege to communications made outside these prerequisites.[10] The accused's communication in this case seems to fulfill all of the requirements set out above.

Mississippi's position as regards this privilege may come as a surprise to many. The Mississippi Supreme Court assiduously guards the confidence that reputedly rests between attorney and client, husband and wife, and physician and patient.[11] Communications between lawyers and clients are protected by the common law,[12] whereas husbands' and wives' communications, as well as physicians' and patients', are protected by statute.[13] The existence of this privilege is absolute in Mississippi in that it can be waived only by the informant.[14] The doctrine of privileges has been tenaciously adhered to as regards physician and patient in spite of the discontent it has caused among liberal members of the bar, and the cogent criticism of it by text writers in general.[15] Furthermore, there is stronger reason for extending the privilege to clergymen and penitents than to physicians and patients.[16]

---

[8]Sherman v. State, 170 Ark. 148, 279 S.W. 353 (1926) (letter written to minister); Alford v. Johnson, 103 Ark. 236, 146 S.W. 516 (1912); Milburn v. Haworth, 47 Colo. 573, 108 P. 155, 19 Ann.Cas. 643 (1910); Gillooley v. State, 58 Ind. 182 (1877); State v. Morgan, 196 Mo. 177, 95 S.W. 402 (1906).

[9]Dehler v. State, 22 Ind.App. 383, 53 N.E. 850 (1899); *In re* Swenson, 183 Minn. 602, 237 N.W. 589 (1931) (liberally interprets "confession").

[10]Gankyo v. People, 54 Colo. 102, 129 P. 241 (1913); Blossi v. Chicago & N. W. Ry. Co., 144 Iowa 697, 123 N.W. 360, 26 L.R.A.(N.S.) 255 (1909) (minister acting merely as a friend or advisor); State v. Brown, 95 Iowa 381, 64 N.W. 277 (1895) (made to minister on board a train, seeking advice merely); Christensen v. Pestorious, 189 Minn. 548, 250 N.W. 363 (1933) (ordinary relation of events of an accident); Partridge v. Partridge, 220 Mo. 321, 119 S.W. 415, 132 Am.St.Rep. 584 (1909) (information received by priest while acting as a notary); Hills v. State, 61 Neb. 589, 85 N.W. 836, 57 L.R.A. 155 (1901) (asking minister to write a letter of intercession to accused's wife); Colbert v. State, 125 Wis. 423, 104 N.W. 61 (1905) (accused wrote priest letter falsely purporting to be a confession of another party to the crime).

[11]Fortunately, however, Mississippi has not reached the dizzying extremities of some states and included accountants (Illinois: Smith-Hurd c. 110½, § 19, Rev. St. 1935; New Mexico: St. 1929, c. 108), newspaper reporters (Alabama: Code of 1940, Tit. 7, 370), stenographers (8 WIGMORE, EVIDENCE (3rd ed. 1940) § 2286, par. 3, n. 17 cites Oregon: Code 1930, 9-404, par. 6).

[12]Parkhurst v. McGraw, 24 Miss. 134 (1852).

[13]MISS. CODE ANN. (1942) § 1689 (husband and wife) and § 1697 (physician and patient).

[14]Although Parkhurst v. McGraw, 24 Miss. 134 (1852), does not state so expressly, it bases its authority on Greenough v. Gaskell, 1 M. & K. 102, 103, which does state this proposition: ". . . they [lawyers] are not only justified in withholding such matters, but bound to withhold them." As between husband and wife, the consent of *both* must be had before the evidence may be admitted. MISS. CODE ANN. (1942) § 1689.

[15]8 WIGMORE, EVIDENCE (3rd ed. 1940) §§ 2380-2382. For an illuminating attack see Welch, *Another Anomaly—The Patient's Privilege* (1941) 13 MISS. L. J. 137. It is interesting to note that one of Mr. Welch's suggested amendments was enacted by the 1944 session of the Mississippi Legislature. Miss. Laws 1944, c. 315.

[16]Welch, *Another Anomaly—The Patient's Privilege* (1941) 13 MISS. L. J. 137, points out the absurdity of the privilege now given by the physicians' and patients' statute in Mississippi. 8 WIGMORE, EVIDENCE (3rd ed. 1940) § 2285 lists four fundamental conditions, all of which are necessary before the privilege could justifiably be granted: (1) The communications must originate in a confidence that they will not be disclosed; (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; (3) The relation must be one which in the opinion of the community ought to be

Add to the Supreme Court's firm stand on privileged communications the reputation Mississippi carries of being well centered in the "Bible Belt," it would appear that at least there might have been some mention of the problem in this case.

Too frequently today that very body, the trial court, which should be foremost in ascertaining the truth, is in fact the only place where it is impossible to acquire certain information. It would be encouraging indeed if the court's ruling in this case represented an impatience with useless regulations hampering the trial court's efficient administration of litigation.

Armis E. Hawkins

---

sedulously fostered; and (4) The injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation. In § 2340a, he points out that only the third condition is present in the physician-patient relation, whereas in § 2396 he shows that all four apply to the clergy-penitent relation.